Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi @ Saw Boon Kooy (deceased)) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–434 OF 2005

MOKHTAR SIDIN, LOW HOP BING AND SURIYADI JJCA

19 SEPTEMBER 2007

Civil Procedure — Injunction — Interim injunction — Whether dismissal of plaintiff's claim after trial necessarily means injunction ought not to have been granted in the first place — Whether finding that injunction ought not to have been granted must first be made before order for damages may be made.

Companies and Corporations — Directors — Fiduciary duties — Whether duty to raise capital had been exercised in good faith

Companies and Corporations — Shares — Allotment of shares — Shares improperly allotted — Whether affairs of company inseparable from affairs of partnership — Whether allotment of shares done equally between partners

Partnership — Existence of partnership — Intention, conduct and actions of parties — Whether companies incorporated in the course of partnership — Whether equity in companies correspond with share in partnership

Partnership — Termination — Dissolution — Whether affairs of partnership determined upon transfer or death — Whether there is entitlement to formal dissolution

The appellant started his business in 1955 as sole proprietor and thereafter in partnership with his elder brother, the first respondent, on 1 January 1963. Various companies were incorporated in the course of and with the expansion of the partnership business, namely the second to fifth respondents. Landed properties, public quoted shares and private companies shares were purchased in the name of the companies. Sometime in 1989, the business and goodwill of the partnership was transferred to the second respondent, several trademarks in the joint names of the appellant and the first respondent

were also assigned to the second respondent. Over the course of years, shares in the companies were allotted in the names of the appellant and the first respondent, as well as in the names of the family members. Dispute between the appellant and the first respondent arose over the assets and finances of the partnership and share allotments in the companies. The appellant commenced proceedings against the respondents on 11 July 1995 under Penang High Court Civil Suit No 22–159 of 1995, for various declarations and relief in respect of properties and shares purchased with partnership monies, monies belonging to the partnership and the shares allotments in the companies. In the meantime, the first and second respondents commenced proceedings against the appellant under Kuala Lumpur D3–22–308 of 1995 (later Penang High Court Civil Suit No 22–317 of 1995), essentially for the trade marks registered in the course of the partnership business to be assigned to the second respondent. Both proceedings were consolidated on 30 September 1996. The trial judge dismissed the appellant's claims under Penang High Court Civil Suit No 22–159 of 1995, dissolved the order of injunction granted on 21 December 1995 and allowed the respondents' claims under Penang High Court Civil Suit No 22–317 of 1995. The appellant appealed to the Court of Appeal.

Held, allowing the appeal:

(1) The issue of legitimate expectation is a question of law to be determined objectively, considering the circumstances under which the companies were incorporated and the very nature of the companies. The issue of legitimate expectation is inseparable from what was a fair and valid presumption that companies incorporated for the purpose and in the course of the partnership business and funded with money belonging to the partnership were likewise incorporated on account of the partnership by virtue of ss 22(1) and 23 of the Partnership Act 1961. To the extent that companies incorporated for the purpose and in the course of the partnership business and funded with money belonged to the partnership are deemed to have been incorporated on account of the partnership, it was difficult to rebut the presumption that the appellant's share equity in the companies shall likewise correspond with his share in the partnership (see paras 16, 18 & 19).

(2) As the affairs of the companies were inseparable from the affairs of the partnership, the duty of good faith continued and would oblige the first respondent to explain why there should be no parity in the share equity in the companies as between the appellant and the first respondent (see para 25).

(3) The defence of *non est factum* is indeed available to the appellant 'not merely on the ground of fraud, where fraud exists, but on the

ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended. The law must gave effect to the policy which requires that a person should not be held to a bargain to which he has not brought a consenting mind and where there is no conflicting or countervailing consideration to be accommodated (see paras 28–29).

(4) Invariably, all the resolutions for the allotment of shares in the companies were made pursuant to the article which provides that 'a resolution in writing signed by all the directors shall be as valid and effectual as if it had been passed at a meeting of directors duly constituted'. The resolutions made no reference whatsoever to the relevant articles which provide that new shares must first be offered to the existing shareholders (see para 38).

(5) The evidence also shows that the shares held by the first respondent and his family members were intended to serve his personal and family interests by creating a family shareholding majority. The first respondent had never explained why the allotment of those shares was done in such a manner instead of equally between him and the appellant. The fiduciary power of the directors to raise capital had not been exercised in good faith and for the best interest of the companies. It follows that the shares as allotted and all subsequent transfers would stand impugned and are null and void (see para 46).

(6) The source, circumstances and purpose of the acquisition, and the manner in which the assets in issue had subsequently been dealt with, do establish conclusively that the properties, shares and monies in issue are partnership property (see para 62).

(7) Whilst both the appellant and the first respondent had access to cheque books and a right to issue and sign cheques without the signature of the other, they, as partners, certainly do not have the right to withdraw monies freely and without having to account for such withdrawals. In law, the right to issue and sign cheques is not an unfettered right without responsibility or obligation. In the circumstances, the practice on the part of the appellant and the first respondent in making withdrawals, whether for business purposes or for the purchase of properties or for their personal needs and family expenses, does not mean that there is an arrangement between them as partners to treat such withdrawals as their share of partnership profits (see para 66).

(8) The audited accounts were indeed inadmissible considering that the accounts had not only been challenged but that the auditors had not been called to verify the contents, whether for purposes of proving the

ownership of the properties or for the purposes of determining the nature of the businesses carried out by the companies (see para 79).

(9) Contrary to the learned judge's finding, the statutory confirmation signed by the appellant that the audited accounts were a true and fair view of the results of the business pursuant to s 169(5) and (16) of the Companies Act 1965 is not conclusive of ownership of the properties nor is it an indication of any intention on the part of the appellant and the first respondent to treat the properties as belonging to the companies (see para 80).

(10) Neither the Companies Act 1965 nor the principle of public policy prohibited a director from challenging the very accounts that he may had signed under the provisions of the Companies Act 1965. Any other view to the contrary would mean that audited accounts would be admissible as a matter of course and without question merely because they had been signed by the directors (see para 82).

(11) There is no basis to the second respondent's claim to an assignment of the remaining trade marks, whether founded on their alleged use of the trade marks or on consideration by way of payment for the renewal of the trade marks. The assumption on the part of the second respondent of the good will and business of the partnership does not, as a matter of course, extend to the assumption of the assets of the partnership, including the trade marks, whether for trading purposes or otherwise (see para 89).

(12) Even if there had been a technical dissolution of the partnership, whether upon the transfer of the partnership in 1989 or upon the death of the first respondent on 19 June 2001, it does not necessarily follow that the affairs of the partnership had thereby been determined or wound up. On the contrary, everything points to an unsettled and unsatisfactory state of affairs, with the properties purchased with partnership funds remaining registered in the names of the partners, the companies and the family members, and monies and documents of title belonging to the partnership remaining in the possession of the respondents. The appellant's entitlement to a formal dissolution to enable the affairs of the partnership to be determined, including all transactions effected up to and after the dissolution of the partnership, was firmly established both under statute and common law (see paras 109–110).

(13) The fact that the learned judge had dismissed the appellant's claims altogether does not necessarily mean that the said order of injunction ought not to have been granted in the first place. The need to establish, after trial, whether the injunction ought or ought not to had been granted was rather important, since the appellant would no doubt have

satisfied the trial judge at the inter-parte hearing on the criteria for an injunction pending trial following the principles of *American Cyanamid*. Unless there had been an express finding on the part of the trial judge that the said order of injunction had not been rightly granted, the trial judge should not had ordered damages to be assessed (see para 114).

(14)Although it was true that the said order of injunction was not subject to any undertaking as to damages, it was within the trial judge's discretion to order damages if justice so requires. Justice would require that the discretion be exercised, whether or not there exists an undertaking as to damages, if it was established that the injunction ought not to have been granted in the first place (see para 117).

[Bahasa Malaysia summary

Perayu telah memulakan perniagaan pada 1955 sebagai pemilik tunggal dan sesudah itu melalui perkongsian dengan abangnya, responden pertama, pada 1 Januari 1963. Pelbagai syarikat telah ditubuhkan selama dan dengan pertambahan perniagaan perkongsian tersebut, iaitu responden kedua sehingga kelima. Hartanah, saham-saham terbitan awam dan syarikat sendirian berhad telah dibeli atas nama syarikat. Sekitar tahun 1989, perniagaan dan nama baik perkongsian telah dipindahmilik kepada responden kedua, beberapa tanda dagangan di dalam nama bersama perayu dan responden pertama telah diberi hak kepada responden kedua. Selepas beberapa tahun, saham-saham dalam syarikat-syarikat telah diperuntukkan kepada nama-nama perayu dan responden pertama, dan juga ke atas nama-nama ahli-ahli keluarga. Pertikaian antara perayu dan responden pertama berpunca daripada aset-aset dan kewangan-kewangan perkongsian dan peruntukkan saham-saham dalam syarikat-syarikat. Perayu telah memulakan prosiding terhadap responden-responden pada 11 Julai 1995 di bawah guaman sivil Mahkamah Tinggi Pulau Pinang No 22–159 Tahun 1995, untuk pelbagai deklarasi dan relief berkenaan dengan harta tanah dan saham-saham yang dibeli dengan wang perkongsian, wang kepunyaan perkongsian dan peruntukkan saham-saham dalam syarikat-syarikat. Pada masa yang sama, responden pertama dan kedua telah memulakan prosiding terhadap perayu di bawah guaman sivil Kuala Lumpur No D3–22–308 tahun 1995 (selepas itu Guaman Sivil Mahkamah Tinggi Pulau Pinang No 22–317 tahun 1995), pada dasarnya untuk tanda niaga yang didaftarkan semasa perniagaan perkongsian diberikan hak kepada responden kedua. Kedua-dua prosiding telah disatukan pada 30 September 1996. Hakim bicara telah menolak tuntutan perayu di bawah guaman sivil Mahkamah Tinggi Pulau Pinang No 22–159 tahun 1995, membubarkan perintah injunksi yang diperolehi pada 21 Disember 1995 dan membenarkan

tuntutan responden di bawah guaman sivil Mahkamah Tinggi Pulau Pinang No 22–317 tahun 1995. Perayu telah merayu kepada Mahkamah Rayuan. A

Diputuskan, membenarkan rayuan: B

(1) Isu mengenai jangkaan yang sah adalah persoalan perundangan hendaklah ditentukan secara objektif, mempertimbangkan keadaan penubuhan syarikat dan jenis syarikat. Isu mengenai jangkaan yang sah tidak dapat dipisahkan daripada anggapan yang adil dan sah bahawa syaikat-syarikat ditubuhkan bagi tujuan dan bagi perniagaan perkongsian dan bermodalkan wang kepunyaan perkongsian beserta penubuhan akaun untuk perkongsian mengikut kuasa s 22(1) dan 23 Akta Perkongsian 1961. Sehingga pada peringkat bahawa syarikat-syarikat yang ditubuhkan untuk tujuan dan bagi perniagaan perkongsian dan bermodalkan wang kepunyaan perkongsian boleh diumpamakan telah ditubuhkan atas akaun perkongsian, ia adalah rumit untuk menyanggah andaian bahawa ekuiti saham perayu dalam syarikat-syarikat hendaklah berpadanan dengan saham dalam perkongsian (lihat perenggan 16, 18 & 19). C D E

(2) Oleh kerana hal ehwal syarikat tidak boleh dipisahkan daripada hal ehwal perkongisan, kewajipan suci hati akan berterusan dan akan menyebabkan responden pertama menerangkan kenapa tidak perlu persamaan dalam ekuiti saham dalam syarikat-syarikat diantara perayu dan responden pertama (lihat perenggan 25). F

(3) Pembelaan *non est factum* sesungguhnya ada kepada perayu bukan hanya atas alasan penipuan, tetapi atas alasan bahawa minda penandatangan tidak mengiringi tandatangan, dalam erti kata lain, bahawa beliau tidak pernah berniat untuk menurunkan tandatangan, dan oleh itu dari sudut perundangan beliau tidak pernah menandatangani, kontrak dimana namanya telah dilampirkan. Undang-undang hendaklah memberikan kesan kepada polisi yang memerlukan bahawa seseorang tidak boleh diumpamakan telah menawarkan dimana minda beliau tidak dibawa untuk memberikan sebarang kebenaran dan dimana tiada konflik atau mengimbangi balasan untuk disesuaikan (lihat perenggan 28–29). G H

(4) Selalunya, kesemua resolusi untuk peruntukkan saham-saham dalam syarikat dibuat menurut kepada artikel yang menyediakan bahawa 'satu resolusi bertulis yang ditandatangani oleh kesemua pengarah adalah sah dan berkesan sebagaimana ia telah diluluskan pada mesyuarat pengarah-pengarah yang yang dibuat dengan cara yang sepatutnya'. Resolusi-resolusi tidak merujuk kepada artikel-artikel relevan yang I

memperuntukkan saham-saham baru hendakah ditawarkan kepada pemegang-pemegang saham sedia ada (lihat perenggan 38).

(5) Keterangan juga menunjukkan bahawa saham-saham yang dipegang oleh responden pertama dan ahli-ahli keluarganya diniatkan untuk tujuan kepentingan diri dan keluarganya dengan mencipta pemegang-pemegang saham keluarga majoriti. Responden pertama tidak pernah menerangkan kenapa peruntukkan saham-saham itu dibuat dalam keadaan sedemikian bukannya menyamai antara dirinya dan juga perayu. Kuasa fidusiari pengarah-pengarah untuk meningkatkan modal tidak pernah digunakan dengan suci hati dan juga untuk kepentingan terbaik syarikat-syarikat. Ia mengikut bahawa saham-saham yang telah diperuntukkan dan kesemua pindahmilik selepasnya akan dipersoalkan dan oleh itu adalah batal dan tidak sah (lihat perenggan 46).

(6) Sumber, keadaan-keadaan dan juga tujuan pengambilalihan, dan juga keadaan di dalam aset-aset yang menjadi isu yang kemudiannya telah diselesaikan, telah menunjukkan secara konklusif bahawa hartanah-hartanah, saham-saham dan wang-wang yang menjadi isu adalah harta perkongsian (lihat perenggan 62).

(7) Semasa kedua-dua perayu dan responden pertama mempunyai akses kepada buku-buku cek dan juga hak untuk mengeluarkan dan menandatangani cek-cek tanpa tandatangan seorang yang lain, mereka, sebagai rakan kongi, sudah tentu tidak mempunyai hak untuk mengeluarkan wang sesuka hati dan tanpa mengambilkira sesuatu pengeluaran. Dalam undang-undang, hak untuk mengeluarkan dan menandatangani cek-cek bukanlah hak tanpa batasan tanpa tanggungjawab dan kewajipan. Dalam keadaan-keadaan tertentu, amalan untuk perayu dan responden pertama dalam membuat pengeluaran, sama ada untuk tujuan perniagaan atau untuk pembelian hartanah-hartanah atau untuk keperluan sendiri dan perbelanjaan keluarga, tidak bermakna bahawa terdapat perancangan antara mereka sebagai rakan-rakan kongsi untuk memperlakukan pengeluaran-pengeluaran sebagai sebahagian daripada keuntungan perkongsian mereka (lihat perenggan 66).

(8) Akaun-akaun yang diaudit sesungguhnya tidak boleh diterima memandangkan akaun-akaun bukan hanya telah dicabar tetapi auditor-auditor tidak dipanggil untuk mengesahkan kandungan-kandungannya, sama ada untuk tujuan membuktikan pemilikkan hartanah-hartanah atau untuk tujuan menentukan jenis perniagaan-perniagaan yang dijalankan oleh syarikat-syarikat (lihat perenggan 79).

(9) Berlainan dengan keputusan hakim terpelajar, pengesahan berkanun yang ditandatangani oleh Perayu bahawa akaun-akaun yang diaudit adalah benar dan pandangan yang tepat hasil daripada perniagaan menurut s 169(5) dan (16) Akta Syarikat 1965 adalah pemilikkan tidak muktamad hartanah-hartanah ataupun ia adalah tanda sebarang niat dipihak perayu dan responden pertama untuk memperlakukan hartanah-hartanah sebagai kepunyaan syarikat-syarikat (lihat perenggan 80).

(10) Tidak pula Akta Syarikat 1965 dan juga prinsip-prinsip polisi awam menghalang pengarah dari mencabar akaun-akaun yang mungkin telah ditandatanganinya di bawah peruntukkan Akta Syarikat 1965. Sebarang pandangan yang berlainan bermakna bahawa akaun-akaun yang telah diaudit boleh diterima sebagai perkara sepatutnya dan tanpa persoalan hanya kerana ia telah ditandatangani oleh pengarah-pengarah (lihat perenggan 82).

(11) Tiada ada sebarang alasan kepada tuntutan responden kedua terhadap perletakkanhak terhadap saki baki tanda niaga, sama ada berasaskan kepada pengataan penggunaan tanda niaga atau balasan melalui pembayaran untuk memperbaharui tanda niaga. Andaian di pihak responden kedua terhadap nama baik dan perniagaan perkongsian tidak, seperti kebiasaan, dilanjutkan kepada andaian aset-aset perkongsian, termasuk tanda niaga, sama ada untuk tujuan perdagangan atau sebaliknya (lihat perenggan 89).

(12) Walaupun jika terdapat pembubaran perkongsian secara teknikal, sama ada sesudah pindahmilik perkongsian pada 1989 atau sesudah kematian responden pertama pada 19 Jun 2001, ia tidak semestinya berlaku bahawa hal ehwal perkongsian dengan demikian telah diputuskan ataupun digulungkan. Sebaliknya, semuanya terarah kepada keadaan hal ehwal yang masih belum diselesaikan dan tidak memuaskan, dengan hartanah-hartanah yang dibeli dengan kewangan tabung perkongsian yang masih lagi didaftarkan atas nama-nama rakan-rakan kongsi, syarikat-syarikat dan juga ahli-ahli keluarga, dan wang-wang dan dokumen-dokumen hakmilik dimiliki oleh perkongsian masih lagi dalam milikan responden-responden. Kelayakkan perayu-perayu untuk pembubaran rasmi bagi membolehkan hal-hal ehwal perkongsian ditetapkan, termasuklah semua urusniaga yang telah berlaku sehingga dan selepas pembubaran perkongsian, telah mempunyai tempat yang kukuh di bawah statut dan undang-undang lazim (lihat perenggan 109–110).

(13) Fakta bahawa hakim terpelajar telah menolak tuntutan perayu kesemuanya tidak membawa maksud bahawa perintah injunksi tersebut tidak boleh diberikan pada peringkat awal. Keperluan untuk membuktikan, selepas perbicaraan, sama ada injunksi akan atau tidak

akan diberikan adalah penting, memandangkan perayu tanpa ragu-ragu telah memuaskan hakim bicara pada pendengaran antara pihak ke atas kriteria untuk satu injunski sementara menunggu perbicaraan menurut prinsip-prinsip American Cyanamid. Kecuali jika terdapat keputusan jelas di pihak hakim bicara bahawa perintah injunksi tersebut tidak sepatutnya diberikan, hakim bicara tidak sepatutnya memerintahkan ganti rugi untuk ditaksirkan (lihat perenggan 114).

(14)Walaupun ia adalah tepat bahawa perintah injunksi tersebut tidak tertakluk kepada sebarang akujanji berkaitan ganti rugi, ia adalah budi bicara hakim untuk memerintahkan ganti rugi jika keadilan berkehendakknya. Keadilan memerlukan bahawa budibicara diamalkan, sama ada terdapat akujanji berkaitan ganti rugi, jika ia dapat dibuktikan bahawa injunksi tidak perlu diberikan pada peringkat awal (lihat perenggan 117).]

Notes

For a case on intention, conduct and actions of parties, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 951.

For cases on allotment of shares, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 813–818.

For cases on dissolution, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1064–1066.

For cases on fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 236–274.

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3115–3187.

Cases referred to

Amalgamated Investment case [1982] 1 QB 84 (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon [2003] 2 MLJ 115 (refd)

Ashworth v Munn [1880] 15 ChD 363 (refd)

Betjemann v Betjemann [1895] 2 Ch 474 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331 (refd)

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 (refd)

Dr Mahesan & Ors v Ponnusamy & Ors [1994] 3 MLJ 312 (refd)

Foster v Mackinnon [1869] LR 4 CP 704 (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302 (refd)

Hogg v Cramphorn Ltd [1967] Ch 254 (refd)

Howard Smith Ltd v Ampol Pertroleum Ltd and others [1974] 1 All ER 1126 (refd)

KMP Khidmat Sendirian Berhad v Tey Kim Suie [1994] 3 MLJ 1 (refd)

Mahima Singh & Ors v Buldev Singh [1975] 1 MLJ 173 (refd)
Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124 (refd)
Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors [1984] 1 MLJ 237 (refd)
Micropack Industries Sdn Bhd, Re [1997] 3 CLJ 459 (refd)
NB Menon v Abdullah Kutty [1974] 2 MLJ 159 (refd)
Petelin v Cullen [1975] 132 CLR 355 (refd)
Petlad Turkey Red Dye Works Ltd v Dyes & Chemical Workers' Union, Petlad & Anor [1960] 2 SCR 906 (refd)
Piercy v S Mills & Co Ltd [1920] 1 Ch 77 (refd)
Ponnukon v Jebaratnam [1980] 1 MLJ 282 (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)
Posgate & Denby (Agencies) Ltd, Re [1987] BCLC 8 (refd)
State Government of Perak v Muniandy [1986] 1 MLJ 490 (refd)
Wragg Limited Re [1897] 1 Ch 814 (refd)

Legislation referred to

Companies Act 1965 ss 132(D)(1), 169, 171
Evidence Act 1950 ss 64, 92(a), 114(g)
Partnership Act 1961 ss 22(1), 24, 26(i), 23, 30, 31, 40, 41, 47(1)
Rules of the High Court 1980 O 18 rr 8, 13(3), 26(a), 30

JA Yeoh (Shearn Delamore & Co) for the appellant.
Wong Chong Wah (Lim Koon Huan and Elaine Ho with him) (Skrine) for the respondents.

Mokhtar Sidin JCA (delivering judgment of the court):

[1] The dispute is essentially between the appellant and the first respondent over properties and monies which were acquired and share allotments in companies which were incorporated in the course of their partnership business.

[2] The appellant started his business in 1955 when he was 22 years old on a 5–foot way, selling assorted goods, then proceeded to operate his business as a sole proprietorship on 1 September 1957 and thereafter in partnership with his elder brother, the first respondent on 1 January 1963, both under the name and style of Soo Chew Trading. The partnership business, which essentially assumed the business of the sole proprietorship, was engaged in trading and distribution of general merchandise, covering assorted household products, toiletries and infant products.

A [3] In the course of the partnership business, several trademarks in respect of infant and household products were registered. In the course of and with the expansion of the partnership business, the respondent companies (the companies) were incorporated. Almost at or about the same time and thereafter, landed properties were purchased and registered in the individual and joint names of the appellant and the first respondent and also in the names of the companies. Over the years, public quoted shares and private company shares were also purchased. Over the course of the years, shares in the companies were allotted in the names of the appellant and the first respondent and in the names of family members, namely, the first respondent's wife, his three sons, his two daughters-in-law, a nephew and the appellant's wife.

[4] Sometime in 1989, the business and goodwill of the partnership was transferred to the second respondent. Following the transfer of the partnership business, several trademarks in respect of infant and household products registered in the joint names of the appellant and the first respondent were assigned to the second respondent.

[5] Towards the end of 1993, the Department of Inland Revenue initiated investigations into the financial affairs of the partnership business and the companies. Following the tax investigations, the dispute between the appellant and the first respondent arose over the assets and finances of the partnership and the share allotments in the companies. In November 1994, the employment of the appellant's daughter, Soo Li Lih (PW4) as an executive officer of the second respondent was terminated. In May 1995, the appellant's mandate as a signatory of the companies' bank accounts was terminated. On or about 3 July 1995, the second respondent issued a letter terminating payment of all salary and expenses due to the appellant with effect from 1 July 1995.

[6] The appellant commenced proceedings against the respondents on 11 July 1995 under Penang High Court civil Suit No 22–159 of 1995. The appellant was the plaintiff in the court below. He filed a writ of summons against all the respondents.

[7] On 13 July 1995 the appellant obtained an ex-parte order of injunction restraining the respondents from, amongst other things, determining his authority, rights, interests and benefits, including his monthly salary and expenses, and from disposing of any of the assets of the respondents. After an inter-parte hearing, an interim injunction pending trial was granted on 21 December 1995. In the meantime, the first and second respondents

commenced proceedings against the appellant under Kuala Lumpur D3–22–308 of 1995 (later Penang High Court Civil Suit No 22–317 of 1995) in respect of the trademarks.

[8] Essentially, the appellant's claims in the proceedings under Penang High Court Civil Suit No 22–159 of 1995 are for various declarations and reliefs in respect of properties and shares purchased with partnership monies, monies belonging to the partnership and the shares allotments in the companies. Primarily, the first and second respondents' claim in the proceedings under Penang High Court Civil Suit No 22–317 of 1995 is that the trade marks registered in the course of the partnership business be assigned to the second respondent. Both proceedings were consolidated by the order of the High Court dated 30 September 1996.

[9] The consolidated proceedings took some 45 days over a period of four years to complete. The trial judge had in his judgment delivered on 18 March 2005 dismissed the appellant's claims under Penang High Court Civil Suit No 22–159 of 1995, dissolved the order of injunction granted on 21 December 1995 and allowed the respondents' claims under Penang High Court Civil Suit No 22–317 of 1995 with costs of the consolidated proceedings to be borne by the appellant.

[10] For the record, there are altogether 40 volumes of the record of appeal. The record comprises four volumes containing the pleadings, memorandum of appeal, submissions and the trial judge's grounds of judgment, three volumes containing the notes of proceedings and the witness statements of the parties and the remaining 33 volumes comprising the documents referred to in the course of the proceedings. The appellant had also filed a volume comprising the core documents.

[11] I have considered the pleadings, the written submissions of the parties, the grounds of judgment of the trial judge, and, where necessary, have referred to the documents, and now furnish herein is my decision.

AGREEMENT

[12] The trial judge had in his grounds of judgment dismissed the appellant's claim to be entitled to the share equity in the companies on an equal basis with the first respondent on the grounds that there was no representation or agreement as between the appellant and the first respondent. It is necessary to examine the trial judge's finding, as it is the appellant's complaint that there had been no judicial appreciation of the evidence on the part of the trial judge. According to the trial judge's grounds of judgment, 'the evidence do not support any agreement or representation

A that the share equity in the companies shall be apportioned as between the plaintiff and the first defendant on an equal basis'.

[13] I have examined the pleadings and the evidence and are in agreement with the submission of the appellant's counsel that the trial judge had overlooked completely the evidence of the appellant on the agreement that he had with the first respondent on the share equity in the companies. It is clear on pleadings in para 16 of the re-amended statement of claim and in the evidence of the appellant that the oral agreement on the share equity between the appellant and the first respondent was made at or about the time of the incorporation of the companies, ie. between 1976 and 1982. It is equally clear on pleadings in paras 24 and 28 of the re-amended statement of claim and in the evidence of the appellant that the agreement on the share equity was further re-addressed between the appellant and the first respondent at or about the time of the transfer of the partnership business to the second respondent in 1989. Although the appellant had under cross examination been asked whether there were any documents to support his allegation on the agreement, the evidence of the appellant on the share equity as agreed remains however unchallenged.

[14] The appellant's counsel submitted that, independently of any agreement or representation, the share equity in the companies should at any rate be apportioned or maintained as between the appellant and the first respondent on an equal basis. In this regard, counsel had raised what, in my view, are compelling issues in the context of the origins of or the circumstances under which the companies were incorporated. These issues, which had been canvassed before the trial judge, are as follows:

(i) that as the companies were incorporated for tax savings and investments, the appellant would have a legitimate expectation that his share equity would be consistent and corresponding with his share in the partnership;

(ii) that inasmuch as 'property acquired on account of the firm or for the purpose and in the course of the partnership business' is partnership property under s 22(1) of the Partnership Act 1961 and in as much as 'property bought with money belonging to the firm is deemed to have been bought on account of the firm' under s 23 of the Partnership Act, 1961, companies incorporated for the purpose and in the course of the partnership business and funded with money belonging to the partnership are likewise deemed to have been incorporated on account of the partnership; and

(iii) that the duty of good faith as a partner would have obliged the first respondent to explain why the appellant's share in the companies should not correspond with his share in the partnership and be equal with the

first respondent's. I have considered the trial judge's grounds of judgment and am of the view that the issues raised should have been resolved in favour of the appellant.

LEGITIMATE EXPECTATION

[15] In holding that the companies were not incorporated for tax savings and investments, the trial judge had clearly misdirected himself, considering that the respondents had in para 8 of their re-amended defence admitted in effect that the companies were incorporated 'for purposes of tax savings and to complement and/or to takeover, if needed be, the business activities of the said partnership'. The respondents' averment that the incorporation is 'not so much for purposes of tax savings as to enjoy the normal benefits and advantages of incorporation' does not detract from the fact that the companies were indeed incorporated for tax savings and investments. That the companies had since their incorporation remained essentially the investment companies for the partnership is not in doubt as apparent from the fact that properties and shares had been purchased with partnership funds from as far back as 1976 and as late as 1992.

[16] In as much as the trial judge was wrong in holding that the companies were not incorporated for tax savings and investments, I think the trial judge was similarly wrong in holding that the issue of legitimate expectation does not arise as 'the incorporation of the defendant companies was not for purposes of tax savings and investments'. With respect, the issue of legitimate expectation is a question of law to be determined objectively, considering the circumstances under which the companies were incorporated and the very nature of the companies. I have considered the case authorities and have no difficulty in accepting that the appellant's claim to legitimate expectation is founded quite securely on the following legal considerations. In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 where at p 379 Lord Wilberforce said:

> A limited company is more than a mere legal entity, with a personality in law of its own:.. there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure... [the just and equitable rule] does, as equity always does, entitle the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between an individual and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way.

[17] In *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8, where Hoffmann J said at p 14:

> The concept of unfair prejudice … enables the court to take into account not only the rights of the members under the company's constitution, but also the agreements or understandings of the members inter se.

[18] The issue of legitimate expectation is inseparable from what, I think, is a fair and valid presumption that companies incorporated for the purpose and in the course of the partnership business and funded with money belonging to the partnership are likewise incorporated on account of the partnership by virtue of ss 22(1) and 23 of the Partnership Act 1961. There is much to be said in favour of the presumption having regard to the observation in *Lindley & Banks on Partnership*, (18th Ed 2002) at para 10–05, p 159 which reads:

> The attainment of the objects which the partners have declared they had in view is always regarded as of the first importance. All the provisions of the articles are to be construed so as to advance and not to defeat those objects; and however general the language of partnership articles may be, they will be construed with reference to the end designed and, if necessary, receive a restrictive interpretation accordingly.

[19] Contrary to the trial judge's observation, the fact that the companies do each have their own memorandum of association does not of itself mean that the companies have an existence separate and independent from the partnership. Although the memorandum of association is essentially the basic constitution of the company, I am mindful nonetheless that the company is 'more than a mere legal entity' and that 'rights, expectations and obligations inter se of the persons behind it are not necessarily submerged in the company's structure', (see *Ebrahimi v Westbourne Galleries Ltd*). To the extent that companies incorporated for the purpose and in the course of the partnership business and funded with money belonging to the partnership are deemed to have been incorporated on account of the partnership, it is difficult to rebut the presumption that the appellant's share equity in the companies shall likewise correspond with his share in the partnership. I find the presumption well founded on the following considerations, namely:

(i) the companies have since their incorporation, remained essentially the investment companies for the partnership, acquiring properties and shares with partnership funds transferred from as far back as 1976 and as late as 1992;

(ii) the companies do not have funds of their own independently of the partnership business considering that funds were being transferred from the partnership bank accounts to the companies from as back as 1976 and as late as 1992;

(iii) the respondents had nowhere in the re-amended defence alleged that the companies were incorporated as family businesses or for the benefit of the respective family members of the appellant and the first respondent;

(iv) the appellant and the first respondent were the only signatories of the bank accounts of the companies until the termination of the appellant's mandate in 1995; and

(v) the appellant and the first respondent were the governing directors of the companies with all the powers and privileges in terms no different from their rights and privileges as partners, holding the office until they die or resign or vacate the office and that the provision for reelection does not apply.

[20] I do not see why there should not be parity in the share equity in the companies as between the appellant and the first respondent as any share allotments could only have been supported by partnership funds. At p 492, para 18–07, *Lindley & Partnership*, (18th Ed 2002) cites Lord Lindley as follows:

> So, if shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company in the name of one partner only, and although it may be contrary to the company's deed of settlement for more than one person to hold shares in it.

DUTY OF GOOD FAITH

[21] The issue of good faith which would oblige the first respondent as partner to explain why the appellant's share equity in the companies should not correspond with the appellant's share in the partnership and be equal with the first respondent's share equity in the companies had been addressed by the trial judge. The trial judge had, in rejecting the appellant's contention, held that the first respondent's duty of good faith was owed to the companies rather than to the appellant and that the appellant was not entitled to rely on the first respondent, being himself more educated and experienced.

[22] That the trial judge had misapprehended the evidence is clear from the fact that the partnership had not been dissolved at or about the time of the incorporation of the companies, and that even after the transfer of the partnership business to the second respondent in 1989, the partnership dealings continued as apparent from the cheque transactions well into 1992. That the duty of good faith is an ongoing duty and is inseparable is clear also from the fact that the affairs of the companies were indeed the affairs of the partnership in that the finances and investments of the companies were funded by the partnership well into 1992. Besides, the appellant is no doubt

A entitled and justified to rely entirely on the first respondent in the face of the clear admission on pleadings in para 6 of the respondents' re-amended defence that 'the first defendant, being the elder brother of the plaintiff, could be relied upon to look after the administration and finance of the partnership business', an admission which would extend to the affairs of the companies B as well.

[23] With respect, the duty of good faith in law is not in any way affected or determined by one's level of education or business experience. The following passages in *Lindley & Banks on Partnership*, (18th Ed 2002) are C indeed a re-affirmation of the principle that the duty of good faith is complete and absolute founded upon trust, honour and conscience. On the general duty of good faith at para 16–01, p 469:

> Perhaps the most fundamental obligation which the law imposes on a partner is the D duty to display complete good faith towards his co-partners in all partnership dealings and transactions. Lord Lindley summarised that duty in the following terms:
>
> > The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arises between partners touching any E transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour.

At p 472 para 16–03 is stated the nature of the duty of good faith: F

> If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust each other that the business G goes on.

[24] On the obligation of partners not to benefit themselves at the expense of their co-partners the following is stated at para 16–11, at p 473:

H > Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people, and in which the firm is in honour and conscience entitled to participate.

I

[25] In the light of the clear statements on the duty of good faith and the evidence, I would have no hesitation in agreeing with the submission of the appellant's counsel that, as the affairs of the companies are inseparable from the affairs of the partnership, the duty of good faith continued and would

oblige the first respondent to explain why there should be no parity in the share equity in the companies as between the appellant and the first respondent. In particular, the duty of good faith would oblige the first respondent to explain the following:

(1) How the resolutions and documents signed by the appellant, including the share certificates, so overwhelmingly in favour of the first respondent and his family members, were for the common interest and for the common good of both the appellant and the first respondent as partners.

(2) How the disparity in distribution as between the appellant and the first respondent as partners could have occurred, with the majority of the share equity in the companies and the partnership property and funds ending up with the first respondent and his family members.

[26] Since the first respondent had not explained the above, it follows that the appellant's claim that the share equity in the companies (second – fifth respondents) should at any rate be apportioned or maintained on equal basis shall prevail.

DOCUMENTS

[27] The learned trial had judge dismissed the appellant's claim to be entitled to half of the share equity in the companies essentially on the basis of the documents, including board resolutions, share certificates and the audited accounts signed by the appellant. Although I have found in favour of the appellant in his claim for the share equity to be apportioned or maintained on an equal basis, I feel obliged to address the issue whether the appellant is indeed entitled in law to challenge the documents he had signed.

[28] I have considered the law and case authorities and do accept that the defence of non est factum is indeed available to the appellant 'not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended, [see *Foster v Mackinnon* [1869] LR 4 CP 704, 711 cited in *Chitty on Contracts*, 29th Ed, Vol 1]. I accept the law as expounded in *The Law Relating to Estoppel by Representation* by George Spencer Bower, third Ed which states:

> The defence of non esta factum can never be excluded by such negligence simpliciter as between the actual parties to the instrument, the validity of which (as between them) will in any given case depend simply upon the proved facts surrounding execution. But as between him who negligently executes an instrument without reading it, and an innocent assignee for value who has acted

on the fact of it, it would seem possible to argue, at least in principle, that if one of them is to suffer it should be that one whose negligence has precipitated the situation.

[29] In *Petelin v Cullen* [1975] 132 CLR 355, a decision of the High Court of Australia, it is stated:

> It is now settled beyond any shadow of doubt that when we speak of negligence or carelessness in connexion with non est factum we are not referring to the tort of negligence but to a mere failure to take reasonable precautions in ascertaining the character of a document before signing it. The insistence that such precautions should be taken as a condition of making out the defence is of fundamental importance when the defence is asserted against an innocent person, whether a third party to the transaction or not, who relies on the document and the signature which it bears and who is unaware of the circumstances in which it came to be executed. It is otherwise when the defence is asserted against the other party to the transaction who is aware of the circumstances in which it came to be executed and who knows (because the document was signed on his representation) or has reason to suspect that it was executed under some misapprehension as to its character. In such a case the law must give effect to the policy which requires that a person should not be held to a bargain to which he has not brought a consenting mind for there is no conflicting or countervailing consideration to be accommodated — no innocent person has placed reliance on the signature without reason to doubt its validity.

[30] In the light of the case authorities herein, I do not think that there is any merit in the respondents' submission that the appellant is estopped from denying knowledge of the contents of the documents that he had signed. Besides, I do not see how the appellant could be estopped when by proviso (a) to s 92(a) of the Evidence Act 1950, 'any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law'.

[31] I have examined the evidence and do accept that the appellant is not only entitled in law but is justified in fact to challenge the documents having regard to the following:

(a) It is not in dispute that there were no shareholders' meetings or directors' meetings or any discussions in connection with the resolutions on increase of authorized capital, the allotment of shares, issuance of share certificates, the appointment of directors and determination of directors' remuneration.

(b) It is admitted on pleadings in para 6 of the re-amended defence that 'the first defendant being the elder brother of the plaintiff, could be relied upon to look after the administration and finance of the partnership business', an admission which no doubt extends to the affairs of the companies as well.

(c) It is acknowledged in evidence by the respondents that by mid 70s, the role of the first respondent was limited to handling the books and accounts of the partnership whilst the appellant was handling the purchasing and sourcing of products and had continued to travel overseas.

(d) The appellant had in evidence explained the circumstances under which the documents were signed, ie, that he had been told that all documents were for purposes of tax savings and investments, that he had always been busy and was not involved in the administration and finance of the business, and that in his confrontation with the first respondent had accused the first respondent as a cheat.

[32] As it is in the context of these circumstances that the defence is being asserted against the first respondent, I would have no hesitation in accepting that the law must give effect to the policy which requires that a person should not be held to a bargain to which he has not brought a consenting mind and where there is no conflicting or countervailing consideration to be accommodated. The respondents' answer to the appellant's challenge that the appellant had had all the opportunity to read and study the documents and is therefore wholly to blame for signing the documents without reading them is untenable. In this regard, I have been referred also to the case of *Betjemann v Betjemann* [1895] 2 Ch 474 where Lindley LJ made the following observation:

> What right has a partner to say to his co-partner: 'You ought not to have trusted me. You are bound to look at the books and see that I am not cheating you?' Such a doctrine as that is unfounded' ….

SHARES IN COMPANIES

[33] The appellant also seeks a declaration that the shares in the companies allotted or issued otherwise than in the names of the appellant and the first respondent on an equal basis are in breach of agreement and without consideration and are null and void. The shares allotted to the appellant and his wife and the first respondent and his family members in the companies are as follows:

A (i) In Soo Chew Trading Sdn Bhd (the second respondent) — the first respondent and his family members were allotted 2,750,000 shares while the appellant and his wife were allotted only 750,000 shares.

(ii) In Doctor Baby (M) Sdn Bhd (the third respondent) — the first respondent and his family members were allotted 4,800 shares while the
B appellant and his wife were allotted only 1,200 shares.

(iii) In Laguta Sdn Bhd (the fourth respondent) — the first respondent and his family members were allotted 183,681 shares while the appellant and his wife were allotted only 45,921 shares.

C

(iv) In Corsame (M) Sdn Bhd (the fifth respondent) — the first respondent and his family members were allotted 80,000 shares while the appellant and his wife were allotted only 20,000 shares.

D **[34]** I have taken note of the shares disparity between the parties in particular in the second respondent. The paid up capital of the second respondent was from the partnership. As a matter of principle the shares allotted to both the appellant and the first respondent would be the same. There is no evidence to show that the paid up capital of the company came
E from other sources except from the partnership.

[35] The appellant had in paras 36 and 37 of his re-amended statement of claim alleged that the first respondent had issued shares in the companies to the family members of the first respondent and to the wife of the appellant
F in breach of agreement and without consideration. Correspondingly, the respondents had in paras 35 and 36 of their re-amended defence denied the allegations and alleged that 'all allotments and transfers of shares were made and effected in accordance with the articles of association and with the express knowledge and consent of the plaintiff'.

G

[36] It is clear upon reading the learned judge's grounds of judgment as a whole that the trial judge had rejected the appellant's claim on the share equity in the companies wholly on the basis of the documents signed by the appellant, ie, the hundreds of documents, namely, resolutions, minutes, share
H certificates and audited accounts signed by the appellant. The learned judge did not in his grounds of judgment address the issue whether the share allotments are ultra vires the articles of association or the issue whether the fiduciary power of the directors to raise capital had been exercised in good faith and in the interest of the companies.

I

[37] Incidentally, the issues, ie, whether the share allotments are ultra vires the articles of association, whether the fiduciary power of the directors to raise capital had been exercised in good faith and in the interest of the companies

and whether the shares are indeed without consideration, may not turn on the fact that the appellant had himself signed the documents.

ARTICLES OF ASSOCIATION

[38] Perusing the articles of association of the companies (the second, third, fourth, and fifth respondents), I notice that the arts 7, 51, 51 and 7 respectively in the respective companies are identical. These articles provide essentially that all further issue of new shares must first be offered to the existing shareholders to subscribe for on the basis of their present shareholdings at the time of the issue unless the company at general meeting determines otherwise. I have perused the various documents, including the resolutions for the allotment of shares in the companies. Invariably, all the resolutions for the allotment of shares in the companies were made pursuant to the article which provides that 'a resolution in writing signed by all the Directors shall be as valid and effectual as if it had been passed at a meeting of directors duly constituted'. The resolutions made no reference whatsoever to the relevant articles which provide that new shares must first be offered to the existing shareholders. I am unable to find anything at all to show that the allotment of shares to the family members had been effected in accordance with the relevant articles and in particular the proviso therein, ie, that all further issue of new shares must first be offered to the existing shareholders unless the company at general meeting determines otherwise.

[39] In *Mahima Singh & Ors v Buldev Singh* [1975] 1 MLJ 173, the Federal Court held that the act of the directors in issuing shares without offering the shares to the existing shareholders was ultra vires the Articles of Association and that, accordingly, the shares were null and void. In *Re Micropack Industries Sdn Bhd* [1997] 3 CLJ 459, the Ipoh High Court following the decision of Mahima Singh & Ors v Buldev Singh held that the failure on the part of the company to offer its existing shareholders the first option of taking up the shares renders the issuance of the shares void. Further, s 132(D)(1) of the Companies Act 1965 expressly provides that notwithstanding anything in a company's memorandum or articles, the directors shall not without the prior approval of the company in general meeting, exercise any power of the company to issue shares.

[40] Chan & Koh on *Malaysian Company Law, Principles & Practice*, (2nd Ed 2006) commenting on s 132(D) of the Companies Act:

> Section 132D is inspired by the Jenkins report where it was recommended that the directors should not have the power to issue any shares in the original or any increased capital of a company without the prior approval of the company in general meeting. The Jenkins report observed that the directors' unfettered discretion to issue equity shares had not always worked to the advantage of the

members. There were cases where shares were issued for cash below their market value to other than the existing members. The effect was to dilute the equity capital, 'at the expense of the existing shareholders, for the advantage of the newcomers.

[41] In the present appeal, as the respondents had failed to prove the averment that the share allotments were effected in accordance with the articles of association, the share allotments in the names of the family members, ie, the first respondent's wife, his three sons, his two daughters-inlaw, a nephew and the appellant' s wife are therefore null and void. It follows, as a matter of course, that all transfers of shares effected subsequent to the share allotments in favour of the family members, would similarly be null and void.

FIDUCIARY POWER

[42] The appellant had in para 58 of his re-amended statement of claim alleged that the share equity and affairs of the companies had been determined to secure for the first respondent and his family members a controlling stake in the companies at the expense of the appellant. The respondents had in para 57 of their re-amended defence merely put the appellant to strict proof of the allegation.

[43] It is fairly established that the power to issue shares given to the directors is primarily to enable capital to be raised when required for the purposes of the companies and that the power is a fiduciary power to be exercised bona fide for the best interest of the company. In *Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312, Zakaria Yatim J in holding that an allotment of shares made by the directors with improper motive and not in good faith was null and void cited in support the case *Piercy v S Mills & Co Ltd* [1920] 1 Ch 77 where it was held:

> A power to issue shares in a limited company given to directors for the purpose of enabling them to raise capital when required for the purpose of the company is a fiduciary power to be exercised by them bona fide for the general advantage of the company, and when the company is in no need of further capital, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control, or the control of themselves and their friends, over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders.

[44] In *Hogg v Cramphorn Ltd* [1967] Ch 254, it was held that the power to issue shares was a fiduciary power, and if exercised for an improper motive, the issue of such shares was liable to be set aside, it being immaterial that the

issue was made in the bona fide belief that it was in the interest of the company. In *Howard Smith Ltd v Ampol Pertroleum Ltd and others* [1974] 1 All ER 1126, at p 1134 Lord Wilberforce cited the judgment in *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co No Liability* said:

> The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends.

[45] In the present appeal, it was contended by the appellant that the share allotments were not and could not have been done in good faith and in the best interest of the companies because:

(i) None of the companies, admittedly incorporated for purposes of tax savings and to complement and/or to take over the business activities of the partnership, were in need of capital, and that partnership funds were transferred to the companies as early as 1976 and as late as 1992 as apparent from the cheque counterfoils in the possession of the Department of Inland Revenue;

(ii) No reason, whether on pleadings or in evidence, had been given by the respondents to show why it was in the best interest of the companies to have the shares allotted or issued in the names of the family members of the first respondent, a nephew and the appellant's wife; and

(iii) The appellant had in evidence explained that he could not have agreed to the share allotments in favour of the family members, including his wife, as the companies were 'set up as a result of profits made by the partnership business for tax savings and investments for the mutual benefit of the two partners.

[46] I find that the appellant's counsel is justified in making the contention because the number of shares held by the first respondent and his family members far outnumbered he shares held by the appellant and his wife. The evidence also shows that the shares held by the first respondent and his family members were intended to serve his personal and family interests by creating a family shareholding majority. The first respondent had never explained why the allotment of those shares was done in such a manner instead of equally between him and the appellant. For the above reasons, I could not help but to find that the fiduciary power of the directors to raise capital had not been exercised in good faith and for the best interest of the companies. It follows that the shares as allotted and all subsequent transfers would stand impugned and are null and void. Since the issues whether the

share allotments are ultra vires the articles of association and whether the fiduciary power of the directors to raise capital had been exercised in good faith and in the interest of the company, do not turn on the fact that the appellant himself had signed the documents, it is irrelevant, insofar as these issues are concerned, whether the appellant had signed the resolutions or share certificates without reading them or on the understanding that the documents were for tax savings and investments.

CONSIDERATION

[47] I have examined the averment in para 36 of the appellant's re-amended statement of claim that the shares issued to family members were without consideration and the respondents' corresponding averment in para 35 of the re-amended defence that the allotments and transfers of shares were effected in accordance with the articles of association. I have taken note of the evidence adduced on behalf of the appellant that no consideration, whether in cash or kind, had been paid for the shares allotted. My attention is drawn also to the fact that the resolutions for the allotment and transfer of shares do not disclose the amount or price paid in consideration of the shares allotted or transferred. Indeed, no questions had been put to the appellant under cross examination that the share allotments or share transfers to the family members of the first respondent and to the appellant's wife had been paid for.

[48] It is my view that the issue of consideration may be addressed quite sufficiently on the basis of the pleadings. Order 18 Rule 13(3) of the Rules of the High Court, 1980 expressly provides that 'every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be, and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them'. *Bullen and Leake and Jacob's, Precedents of Pleadings*, (12th Ed 1975) states at p 78:

> This rule enforces a cardinal principle of the system of pleadings that every allegation of fact in a statement of claim must be traversed specifically. Otherwise it is deemed to be admitted. The penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is admitted or treated as admitted is that the party who makes it need not prove it. Thus, if the facts pleaded in the statement of claim are admitted, there is no issue between the parties of the case which is concerned with those matters of fact and, therefore, no evidence is admissible in reference to those facts.

[49] In the case of *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302, the Supreme Court had held that parties are not entitled to raise issues not specifically pleaded and that issues raised in contravention of O 18 r 8 of the Rules of the High Court 1980 should not be entertained.

[50] In the circumstances, and in the absence of any specific traverse or averment in the respondents' re-amended defence that the share allotments or share transfers were with consideration, it follows that the appellant is justified in his contention that the share allotments or transfers were without consideration. Indeed, it is not open to the respondents to challenge the fact that the shares were without consideration as pleaded, more so, when the resolutions do not disclose the amount or price paid in consideration of the shares.

[51] Lest that it be said that I have paid no regard to the evidence adduced by the respondents that the shares were with consideration, I have nonetheless examined the finding of the learned judge that there had been consideration, but am, however, unable to agree with him. The principles of pleading and practice aside, I find that there had been misapprehension on the part of the learned judge in holding that the books comprising the printed statements of the shareholders' and directors' current accounts are in themselves proof of consideration and that the audited accounts of the companies do show that the shares had been paid in full.

[52] Contrary to the learned judge's finding, the books comprising the printed statements of the shareholders' and directors' current accounts and the audited accounts are in law inadmissible in that the actual books of accounts upon which the printed statements and the audited accounts were based had not been produced as required under s 64 of the Evidence Act, 1950. The judgment of Edgar Joseph J in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 is reproduced herein:

> It is a firmly established rule (to which there are exceptions) requiring that when documentary evidence is tendered, primary evidence of the document, that is to say the production of the documents itself is essential (see s 64 of the Evidence Act).

[53] I have, when addressing the issue of partnership property, cited the judgment of the Federal Court in *KMP Khidmat Sendirian Berhad v Tey Kim Suie* [1994] 3 MLJ 1, that the mere fact that the summary of accounts or summary of particulars had been made could never be taken as proving that

A the contents were correct and that the contents had to be proved by calling the maker to explain the facts and the basis of the calculation.

[54] Quite apart from the issue of inadmissibility, it is clear that the shareholders' and directors' current accounts, whether as a form of savings
B from salaries or otherwise, are mere book entries. This is confirmed by the evidence of the witness, Kong Kooi Lean (DW3), who had admitted under cross-examination that 'there were no actual cash paid into the accounts by these persons and had under re-examination re-confirmed that 'there is no actual movement of cash into the accounts'. Besides, the respondents'
C contention that the current accounts are made up of salaries of family members is untenable as the salaries attributed to the family members could not possibly have been valid entries or accounts. My finding follows from the fact that it is not in dispute that the family members of the first respondent, namely, his wife and daughters-in-law as well as the appellant's wife are not
D bona fide employees of the partnership nor of the companies although their names had been included as employees.

[55] Further, nowhere in the books comprising the printed statements of the shareholders' and directors' current accounts is disclosed the amount of
E consideration, if any, paid by each of the family members of the respondents or, for that matter, the appellant's wife. Indeed, no evidence had been adduced to show the amount of the shareholders' or directors' current accounts that had been transferred or effected for purposes of settling the consideration for the share allotments or transfers. It is my finding, therefore,
F that the alleged consideration for the share allotments is illusory and cannot accordingly be treated as fully paid. My finding follows from my evaluation of the evidence and from the law as stated by Vaughan Williams J in *Re Wragg, Limited* [1897] 1 Ch 814:

G
> I believe that the court ought to go into the question of whether there is real consideration or whether the consideration is a sham, not only in the case where the whole consideration is impeached, but in the case where a part of the consideration is impeached; but whether it is the whole that is impeached or whether it is a part that is impeached, in my judgment you can only impeach it
H in cases where the evidence justifies you in saying that, qua that part of the consideration, the transaction is a sham - that the transaction is a colourable one.

[56] In the light of my finding that the share allotments are ultra vires the articles of association and are in breach of the fiduciary power of the directors
I to raise capital in good faith and in the interest of the company and are also without consideration, it follows that the shares as allotted and all subsequent transfers are null and void. In my view, the fact that the family members to whom shares had been allotted had not been made parties to the action is quite irrelevant, since it is my finding that the share allotments are null and

void. Besides, the reliefs sought by the appellant in respect of the share allotments are wholly as against the first respondent only. A

PARTNERSHIP PROPERTY

[57] Briefly, the appellant seeks various reliefs, including the following declarations: B

(1) The landed assets and shares in private limited and public listed companies purchased and registered in the names of the appellant, the first respondent and the companies are partnership property. C

(2) The landed assets and shares in private limited companies purchased and registered in the names of the family members of the first respondent and an apartment in Los Angeles, USA purchased and registered in the names of the family members of the appellant are partnership property. D

(3) The monies transferred by the first respondent to himself and to his family members and to the companies are partnership property.

[58] The Partnership Act, 1961 provides in essence that property acquired, whether by purchase or otherwise, on account of the firm or for the purpose and in the course of the partnership business, and property bought with partnership money are partnership property. Section 22(1) of the Partnership Act 1961 defines 'partnership property' as all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purpose and in the course of the partnership business. Section 23 of the Partnership Act 1961 expressly provides that: 'Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm'. E F G

[59] The statutory presumption under s 23 of the Partnership Act, 1961, that property purchased with money belonging to the partnership is partnership property unless the contrary intention appears, had been addressed in several judgments of the Federal Court. In *Ponnukon v Jebaratnam* [1980] 1 MLJ 282, the Federal Court held at p 283 as follows: H

> Intention to treat the property as partnership property will be presumed whenever the property is purchased with partnership money, although it may have been purchased by or in the name of a partner only. This presumption, however, will be rebutted if it is proved that the money used for the purchase was in fact not belonging to the partnership, as for example, the money was lent to the partner, in such event the property is not a partnership property. Thus the question as to who pays for the property is important. I

[60] In *NB Menon v Abdullah Kutty* [1974] 2 MLJ 159, the Federal Court cited *Lindley on Partnership* (12th Ed) at p 160 as follows:

> It is for the partners to determine by agreement amongst themselves what shall be the property of the firm, and what shall be the separate property of one or more of them. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. Upon this subject there have been many decisions which will be alluded to hereafter, but the principal rules which may be deduced from the cases are now incorporated in ss 20 and 21 of the Partnership Act 1890. …

Sections 20 and 21 of the Partnership Act, 1890 are equivalent to ss 22 and 23 of our Partnership Act, 1961.

[61] In this regard, I find the following passages in *Lindley & Banks on Partnership*, (18th Ed 2002) at para 18–03, p 491 and at para 18–07, p 492 helpful. Para 18–03 reads as follows:

> As intimated in the previous paragraph, it is up to the partners to agree between themselves what assets are to be treated as partnership property. In the absence of an express agreement, the relevant factors will generally be (1) the circumstances of the acquisition, with particular reference to the source from which it was financed, (2) the purposes of the acquisition, and (3) the manner in which the assets has subsequently been dealt with. The importance of these factors, which are illustrated in many of the earlier cases, is firmly established by ss 20 and 21 of the Partnership Act 1890.

Para 18–07 reads as follows:

> The mere fact that the property in question was purchased by one partner in his own name is immaterial, if it was paid for out of the partnership monies; for in such a case he will be deemed to hold the property. in trust for the firm, unless he can show that he holds it for himself alone. Upon this principle it has been held that land purchased in the name of one partner, but paid for by the firm, is the property of the firm, although there may be no declaration or memorandum in writing disclosing the trust, and signed by the partner to whom the land has been conveyed. So, if shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company in the name of the partner only, and although it may be contrary to the company's deed of settlement for more than one person to hold shares in it.

[62] Having considered the evidence, the judgments of the Federal Court and the observations in *Lindley & Banks on Partnership*, (18th Ed 2002), it is my finding that the source, circumstances and purpose of the acquisition, and the manner in which the assets in issue had subsequently been dealt with, do establish conclusively that the properties, shares and monies in issue are partnership property. The source, circumstances and purpose of the

acquisition of the properties are clear from the evidence of the appellant himself that the profits of the partnership were never declared for distribution, with some being used as capital, some for purchase of real properties and shares and some being kept in fixed deposit accounts for the benefit of partners. The manner in which the assets had subsequently been dealt with is similarly clear from the evidence of the appellant that he had never been informed by the first respondent that the properties registered in their respective names are their personal properties, and that the income and rentals from the properties and the title deeds to the properties have always been kept by the first respondent. Indeed, there can be no clearer proof of the intention that the properties are partnership property than in the evidence of the appellant that 'the properties were purchased for the benefit of two of us. This is because the properties were purchased using the profits from the partnership business and we were the partners in the business'.

[63] It is my finding that the evidence of the appellant on the source, circumstances and purpose of the acquisition of the properties and the manner in which the properties had subsequently been dealt with had not been challenged. Likewise, the source of the transfers of monies by the first respondent to himself, his family members and to the companies, all being from the partnership bank accounts, had not been challenged. The summary of the partnership cheque counterfoils shows very substantial payments to the various solicitor firms, stock broking firms, the companies and to the first respondent himself and his family members.

[64] In holding that the statutory presumption had been rebutted and thereby dismissing the appellant's claims, the trial judge had referred to the availability of the cheque books to the partners, their unqualified right to withdrawals of partnership monies, the perceived arrangement between the partners to withdraw partnership monies for their own personal benefit and as part of their share of the partnership profits, the even distribution of the properties between the partners and the entries in the audited accounts of the partnership and the companies.

[65] With respect, the trial judge, in holding that the statutory presumption had been rebutted, would appear to have missed what is rather common in any partnership practice, namely:

(i) partners' free and absolute access to cheque books, which is common as between partners and is part of the rights and entitlements of partners. *Lindley & Bank on Partnership*, (18th Ed 2002) at para 10–69, p 185 reads:

Whilst most agreements scrupulously provide for the signing of cheques by partners, it is rare to find any clause restricting their authority to initiate transfers between accounts and other similar transactions.

(ii) Partners' right to make withdrawals and to make drawings in anticipation of profits, a right which is not only common as between partners but a consequence of s 26(f) of the Partnership Act 1961, that 'no partners shall be entitled to remuneration for acting in the partnership business'. Para 10–83 at p 191 of *Lindley & Bank on Partnership*, (18th Ed 2002), reads:

> Since the precise quantum of a partner's share of profits will not be known until the partnership accounts have been prepared and approved, the agreement should mgenerally provide for each partner to draw on account of his anticipated profit share, whether monthly or otherwise.

(iii) Partners' duty of good faith, as explained in *Lindley & Bank on Partnership*, (18th Ed 2002) at p 469, para 16–01 which reads:

> The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour.

[66] My conclusion drawn from what is common in any partnership practice is that, whilst both the appellant and the first respondent had access to cheque books and a right to issue and sign cheques without the signature of the other, they, as partners, certainly do not have the right to withdraw monies freely and without having to account for such withdrawals. In law, the right to issue and sign cheques is not an unfettered right without responsibility or obligation. In the circumstances, the practice on the part of the appellant and the first respondent in making withdrawals, whether for business purposes or for the purchase of properties or for their personal needs and family expenses, does not mean that there is an arrangement between them as partners to treat such withdrawals as their share of partnership profits.

[67] On my part, I am unable to find any evidence on the perceived agreement or arrangement between the appellant and the first respondent as partners withdraw monies from the partnership accounts for their own personal benefit and as part of their share of the partnership funds or profits. Incidentally, no accounts had been disclosed to show the withdrawals, whether on the part of the appellant or on the part of the first respondent,

as their share of the partnership funds or profits. In the absence of any such evidence, I do not see how the statutory presumption could have been rebutted, more so, given the trial judge's finding that 'throughout the years of the partnership business up to 1989, the profits of the partnership had not been apportioned between or distributed to the plaintiff and the first defendant'.

[68] Further, I could not see how the statutory presumption could have been rebutted when the respondents had in their re-amended defence made no averment that what had been withdrawn by the partners were indeed their share of the partnership profits. No such averment had been made in spite of the allegation in para 67 of the re-amended statement of claim 'that the plaintiff had never at any time in the course of the said partnership business received any dividend or profit in respect of his share in the said partnership'. Perusing the pleadings, I could not find any averment in the re-amended defence that the transfer of partnership funds, whether for the purchase of properties or shares or to the personal accounts of the first respondent and his family members, were in pursuance of an arrangement to withdraw monies for their own personal benefit and as part of their share of the partnership funds or profits.

[69] The law on the failure to establish the issues raised in the defence and that the parties are bound by their pleadings had been addressed by the Supreme Court in the case of*State Government of Perak v Muniandy* [1986] 1 MLJ 490 and in the case of *Gimstern Sdn Bhd & Anor v Global Insurance Co Sdn Bhd*. In the light of the judgement of the Supreme Court in *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* that issues not pleaded in the defence and in contravention of O 18 r 8 of the Rules of the High Court 1980, should not have been entertained, the alleged or perceived arrangement to withdraw monies as part of the partners' share of partnership funds or profits should have been rejected by the trial judge.

[70] In the absence of any pleadings or evidence, I am of the view that the alleged arrangement to withdraw monies as part of the partners' share of the partnership funds or profits, as submitted by the respondents' counsel, is nothing more than an attempt to justify the first respondent's substantial withdrawals and transfers of partnership funds. I am justified in saying so as the alleged arrangement does not accord with the partners' statutory obligation to render true accounts and full information of all things affecting the partnership under ss 26(a) and 30 of the Partnership Act 1961. Besides, such arrangement would be most unusual and questionable, allowing in effect for a free for all dissipation of the partnership accounts. I am not aware of any law which would allow any such arrangement or dissipation, which would inevitably result in one partner enriching himself at the expense of the other

and in disregard of their statutory rights and obligations under the Partnership Act, 1961. *Lindley & Banks on Partnership*, (18th Ed 2002), at p 161 para 10–08 provides:

> Any provision, however worded, will, if possible, be construedso as to defeat any attempt by one partner to avail himself of it for the purpose of defrauding his co-partner.

[71] The trial judge's finding that neither the first respondent nor the appellant could have purchased the properties from their own funds and that the purchases must have come from the partnership funds does in fact settle the issue clearly in favour of the trial judge's finding does confirm that the respondents had not only failed to rebut the statutory presumption but had failed as well to prove the averments in their re-amended defence, namely:

(i) The averment in para 13 of the re-amended defence that 'the assets owned by the second, third, fourth and fifth defendants were not purchased by using the monies channelled or transferred from the profits accrued from the partnership; and

(ii) The averment in para 37 of the re-amended defence that 'the quoted shares and landed properties registered in the names of the first defendant and his family members were bought with their own money and is of no concern and/or relevance to the plaintiff.

[72] The learned trial judge was indeed justified in concluding that the purchases must have come from the partnership funds. There had been a distinct failure on the part of the respondents to show that the purchases or payments were effected from the respondents' own funds. Indeed, no documents whatsoever had been disclosed to show that the purchases or payments, including monies transferred to the family members of the first respondent, were from monies belonging to the respondents themselves and not from the partnership accounts. There is in fact admission in evidence by the first respondent's children, Saw Fatt Seong (DWl) and Soo Hock Seang (DW2) and his daughter-in-law, Kong Kooi Wah (DW4), that the substantial monies that they had received came from the first respondent.

[73] Consequentially, it must follow that the landed assets purchased and registered in the names of the companies, the shares in private companies, including Heng Lean Development Sdn Bhd, the shares in public listed companies, both local and foreign, including the HSBC Holdings plc shares, purchased and registered in the names of the first respondent and his family members, and the monies transferred by the first respondent to himself, his family members and the companies are all partnership property. The trial judge's finding that all purchases must have come from partnership funds

would similarly mean that the landed assets purchased and registered in the names of the appellant and the first respondent, whether jointly or otherwise, are partnership property as well. The learned judge's finding would, of course, extend to the apartment in Los Angeles, USA purchased and registered in the names of the appellant's children. The fact that the apartment was purchased for the use of the appellant's family members or that the appellant's children had subsequently raised a loan of US100,000 on the security of the apartment is quite irrelevant. The statutory presumption remains unrebutted, more so, when, by the appellant's own evidence, 'the properties were purchased for the benefit of two of us as partners'.

[74] The trial judge would appear to have dismissed the appellant's claims on what he perceived to be an even distribution of the properties and funds on the basis of the summary of payments (D4) compiled by the respondents, showing the monies allegedly taken by both the appellant and the first respondent as their share of the partnership profits. It is the appellant's complaint that there had been no evidence or averment on pleadings that withdrawals had been effected from time to time by the partners as their share of the partnership funds or profits. Besides, the cheques and drafts exhibited in the summary of payment (D4) were not drawn in the name of the appellant but in the names of third parties, and that contrary to the trial judge's finding, it is not incumbent upon the appellant to call the third parties to testify on his behalf in respect of the payments. It is quite obvious that the obligation to call the third parties, in whose favour the cheques and drafts were drawn, ie. Ping Hong Enterprise, Margaret Wu, Tsai Lian Shen and Hwang Kin Bang, rests with the respondents as the cheques and drafts were produced by the respondents. Besides, it is the respondents' contention that the said cheques and drafts were not intended for the third parties concerned but were for the appellant's share of the partnership profits or funds.

[75] It has not escaped my attention that the appellant had contended that the cheques and drafts in favour of the third parties and in varying amounts ie. RM14,039.68, RM31,883.05, RM135,368.62, USD3,150, USD3,250 and USD3,450 could only be related to settlement of specific outstanding sums due to the third parties as suppliers in pursuance of a scheme to save on customs duty on the importation of goods. It is the respondents' contention that no such scheme existed because payments had been effected in full by letters of credit. My attention has been drawn to the appellant's summons in chambers for discovery (encl 112), wherein the appellant sought, amongst other things, disclosure of letters of credit and documents in favour of the overseas suppliers corresponding to the period of the said cheques and drafts. My attention has also been drawn to the fact that the respondents in denying the appellant's summons in chambers for discovery had merely alleged that these documents 'may be with the authorities' and had made no allegation

whatsoever that these cheques and drafts were drawn as payments of the appellant's share of partnership profits or funds.

[76] Having considered the evidence, I am of the view that the burden of proof on the cheques and drafts rests wholly on the respondents. Accordingly, since the third parties concerned had not been called by the respondents to establish their assertion that the third parties were not suppliers and that the cheques and drafts were intended as payments of the appellant's share of the partnership funds or profits, it is my finding that an adverse inference should have been drawn as against the respondents under s 114(g) of the Evidence Act 1950.

[77] I have examined the learned judge's finding on what he perceived to be an even distribution of the properties and funds, but on examination of the pleadings and evidence, I could not find anything to justify his finding. On the contrary, the evidence shows quite clearly that the share allotments in the companies, the landed assets, the shares in private and public listed companies and the monies are overwhelmingly in the names of the first respondent and his family members. The schedule in the appellant's core bundle of documents showing the breakdown leaves no doubt that the trial judge's finding on what he perceived to be an even distribution of the properties and funds is without basis. If at all, there had been an even distribution, I could find no case authority to suggest that an even distribution is sufficient to rebut the statutory presumption that the properties, shares and monies are partnership property. My attention has been drawn to the 'distinction between the right to property held jointly in the names of individuals and property held by individuals for partnership business' as observed by the Federal Court in*Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* [1984] 1 MLJ 237 citing the principle enunciated in the case of *Ashworth v Munn* [1880] 15 ChD 363 which is as follows:

> The share of each of the other partners no doubt is not share in any specific asset or any specific part of the assets real or personal, but is his share of what will ultimately come to him when the accounts are ascertained, and when the partners who are to contribute have contributed, and when the assets are got in, the debts paid, and the amounts realized.

AUDITED ACCOUNTS

[78] The learned trial judge have also dismissed the appellant's claims on the grounds that the audited accounts of the partnership and of the companies had been properly audited and that these accounts had not been challenged by the appellant. The appellant had taken his objection on pleadings in para 54 of the re-amended statement of claim alleging that 'the annual returns and audited accounts of the companies had been made up to

show some semblance of business activity for purposes of tax savings'. In addition, the appellant had in para 57 of the re-amended statement of claim alleged that 'the Department of Inland Revenue had in the course of their investigations impounded the books and accounts of the second, third, fourth and fifth defendants and the said partnership on the grounds of tax improprieties committed over the years'. The appellant had in evidence stated that the partnership statements of account in terms of accounts, drawings and profits are all wrong and that the companies accounts are not true as the companies were not doing any business, that the assets disclosed are the assets of the partnership, and that there are no liabilities incurred by the companies.

[79] In the light of the clear objection on pleadings and in evidence, the learned judge is therefore wrong to say that the audited accounts of the partnership and of the companies had not been challenged. The audited accounts are indeed inadmissible considering that the accounts had not only been challenged but that the auditors had not been called to verify the contents, whether for purposes of proving the ownership of the properties or for the purposes of determining the nature of the businesses carried out by the companies. The conclusiveness or otherwise of statements of account, whether audited or otherwise, had been addressed by this court and also by the Federal Court on a number of occasions. The Federal Court in *KPM Khidmat Sendirian Berhad v Tey Kim Suie* held as follows:

> The summary of accounts does not prove the facts and particulars stated therein. The mere fact that the summary of the particulars were made could never be taken as providing that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed. Moreover, the record book upon which the maker based her summary must be in evidence.

[80] The fact that the appellant had signed most, if not all, of the documents relating to the audited accounts of the partnership or the companies, including the directors' reports, is similarly not conclusive of the validity or the truthfulness of the accounts. Contrary to the learned judge's finding, the statutory confirmation signed by the appellant that the audited accounts were a true and fair view of the results of the business pursuant to s 169(5) and (16) of the Companies Act 1965 is not conclusive of ownership of the properties nor is it an indication of any intention on the part of the appellant and the first respondent to treat the properties as belonging to the companies. The issue of whether the books or accounts are indeed conclusive of ownership of the properties or binding on the partners had been addressed in *Lindley & Banks on Partnership*, (18th Ed 2002) at p 188 para 10–74:

> Although an account, once signed and approved, may be binding on the partners, it does not follow that it will be binding for all purposes. Thus, unless the agreement provides otherwise, annual accounts prepared for the purposes of calculating the firm's divisible profits may be of no relevance when calculating the financial entitlement of an outgoing partner. In particular, the fact that goodwill or work in progress has been treated as valueless in such accounts or that other assets have consistently appeared therein at their original or depreciated book value will not, of itself, necessarily justify the adoption of those accounting practices on the death, retirement or expulsion of a partner; a fortiori in the case of a general dissolution. … Equally, the fact that an asset is included in the firm's accounts is not conclusive of its status as a partnership asset.

[81] Having reviewed the evidence, I find that there is considerable justification for the appellant to challenge the accounts, having regard in particular to the following:

(a) The respondents' admission on pleadings in para 6 of the re-amended defence that 'the first defendant being the elder brother of the plaintiff, could be relied upon to look after the administration and finance of the partnership business'.

(b) The respondents' admission on pleadings in para 56 of the re-amended defence that 'the Department of Inland Revenue had impounded the books and accounts of the second, third, fourth and fifth defendants and the partnership for investigations'; and

(c) The undisputed fact that under-declared tax and penalties were levied on the partnership and on the companies following the investigations by the Department of Inland Revenue.

[82] Accordingly, I am of the view that the learned trial judge was in error to say that the court should not lend its aid to the appellant since the appellant, in claiming that the accounts are not true, must have sworn a false declaration for purposes of the requirements under the Companies Act 1965. Although s 171 of the Companies Act 1965 prescribes a penalty of imprisonment for five years or RM30,000 in the event of any wilful non-compliance of the requirements, with respect I must say that neither the Companies Act 1965 nor the principle of public policy prohibits a director from challenging the very accounts that he may have signed under the provisions of the Companies Act 1965. Any other view to the contrary would mean that audited accounts would be admissible as a matter of course and without question merely because they had been signed by the directors. In *Petlad Turkey Red Dye Works Ltd v Dyes & Chemical Workers' Union, Petlad & Anor* [1960] 2 SCR 906, an Indian Supreme Court decision, it was held:

> The mere fact that the statements were made can never be taken as proving that the statements were correct. … There is no reason why an exception should be made in the case of balance sheets prepared by companies for themselves. It has to be borne in mind that in many cases the directors of the companies may feel inclined to make incorrect statements in these balance sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance sheets, the position is clear that we cannot presume the statements made therein to be always correct. The burden is on the party who asserts statement to be correct to prove the same by relevant and acceptable evidence.

The above was cited with approval by the Federal Court in *KPM Khidmat Sendirian Berhad v Tey Kim Suie.*

[83] It goes without saying however, that whether or not the accounts had been challenged or whether the accounts had been signed by the appellant himself, it is for the court to exclude any inadmissible evidence. On the issue of inadmissible evidence, the passage in *Sarkar, Laws of Evidence* (13th Ed) at p 51 applied by Lee Hun Hoe CJ (Borneo) in *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 reads:

> An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties. …

[84] It is settled law that the question as to who pays for the property is important. It is immaterial whether the property is purchased by one partner in his own name or is standing in the books of account in the name of one partner only or in the name of some other person or company, if it was paid out of partnership monies. It is clear that the appellant's claim in respect of the partnership property is founded wholly on funds belonging to the partnership and not on the audited accounts.

TRADE MARKS

[85] Briefly, the trial judge had, in allowing the first and second respondents' claims in respect of the trade marks granted the following orders, namely:

(a) that the trade marks as listed and shown in the schedule 'A' attached ('trade marks') are the property of the partnership of Soo Chew Trading;

(b) that there be specific performance of the oral agreement between the appellant and the respondents to assign the said trade marks owned by the partnership to the second respondent; and

(c) an injunction restraining the appellant from dealing with the said trade marks and an order that the appellant do execute the deeds of assignment, failing which the Senior Assistant Registrar to do so.

[86] In allowing the first and second respondents' claims in respect of the trade marks, the trial judge had apparently based his decision on what he perceived to be the law, citing the case of *Hai-O Enterprise Bhd v. Nguang Chan @ Nguana Chan Liquor Trader (a firm, intervening)* [2002] MLJU 741, and on the perceived evidence that the second respondent are currently using all of the trade marks for trading purposes. With respect, I am of the view that the trial judge was wrong in applying a law which has no relevance to the issue before him. As observed by Shankar J in *Hai-O Enterprise Bhd v Nguang Chan @ Nguang Chan Liquor Trader (a firm, intervening)*, the law, ie, that whoever used the trade mark should be the owner of the mark, is nothing more than a law in its most elemental form. The law in its most elemental form does not apply to trade marks registered under the Trade Marks Act, 1976, or under any corresponding trade marks legislation overseas. Accordingly, it was decided in that case that a foreign manufacturer, who is also the proprietor of the trade mark on products sold in Malaysia, is still the proprietor of the mark, and that the importer, which had been using the trade mark, does not acquire any proprietary rights over the mark. Similarly, where the issue herein is whether the trade marks, registered both locally and overseas in the names of the appellant and the first respondent, should be assigned to the second respondent, the so-called law in its most elemental form is therefore of no relevance. Besides, there are in existence specific deeds of assignment in respect of several trade marks from the appellant and the first respondent to the second respondent following the transfer of the partnership business to the second respondent in 1989.

[87] Contrary to the trial judge's finding, I could find no evidence that then second respondent had been using all of the trade marks in issue. Admittedly, the trade marks assigned by the appellant and the first respondent to the second respondent under the deeds of assignment dated 27 July 1989, 23 September 1991, 17 October 1991, 16 January 1992, 6 August 1992 and 25 November 1992 following the transfer of the partnership business to the second respondent in 1989 may have been used by the second respondent. However, the use of the trade marks limited only to the deeds of assignment does not entitle the second respondent to claim all of the trade marks in issue. Contrary to the respondent's submission, I could find nothing on pleadings or in evidence about the use by the second' respondent of the trade marks listed in schedule (A) to the respondents' statement of claim. Suffice for me to reproduce the passage in *Odgers' Principles of Pleading and Practice*, (22nd Ed 1981) at p 100:

Each party must state his whole case. He must plead all facts on which he intends to rely, otherwise he cannot strictly give any evidence of them at the trial. The plaintiff is not entitled to relief except: in regard to that which is alleged in the pleadings and proved at the trial.

[88] Although the pleadings in the respondents' statement of claim do allege that the consideration for the claim to an assignment of all the trade marks is the payment by the second respondent of the expenses incurred in the upkeep of the trade marks, I am unable to find any evidence in support of such payment. Contrary to the trial judge's finding, the appellant had not however agreed that the second respondent were the party paying for the renewal of the trade marks. The appellant had in evidence, which remains unchallenged, testified that the partnership had paid for the expenses incurred in the registration and renewal of the trade marks prior and subsequent to 1989.

[89] In the circumstances, I find that there is no basis to the second respondent's claim to an assignment of the remaining trade marks, whether founded on their alleged use of the trade marks or on consideration by way of payment for the renewal of the trade marks. The assumption on the part of the second respondent of the good will and business of the partnership does not, as a matter of course, extend to the assumption of the assets of the partnership, including the trade marks, whether for trading purposes or otherwise.

[90] My finding that there is no basis to the second respondent's claim to an assignment of the remaining trade marks is indeed confirmed by the respondents' admission on pleadings in para 5 of their statement of claim that the trade marks 'were registered for the benefit of the partnership and are to be the property of the partnership'. Besides, the fact that there exist only six deeds of assignment in respect of specific trade marks clearly dispels any notion that the second respondent shall be the proprietor of all the trade marks listed in schedule A to the respondents' statement of claim. Incidentally, the second respondent's claim that the trade marks registered are the property of the partnership is identical with the declaration sought by the appellant in his re-amended statement of claim, namely, that the trade marks registered, whether with the Trade Marks Registry, Malaysia and/or elsewhere outside Malaysia, do belong exclusively to the partnership.

[91] In conclusion, I shall therefore affirm that part of the order of the trial judge dated 18 March 2005 in para 2(a) 'that the trade marks as listed and shown in the schedule 'A' attached hereto ('the said trade marks') are the property of the partnership of Soo Chew Trading' and set aside paras 2(b), 2(c) and 2(d) of the said order pertaining to the assignment of the order of

the trial judge, I shall allow correspondingly that part of the appellant's claim, namely, 'a declaration that the trade marks registered in the sole name of the plaintiff, in the joint names of the plaintiff and the first defendant and in the name of Soo Chew Trading, whether with the Trade Marks Registry, Malaysia and/or elsewhere outside Malaysia do belong exclusively to the plaintiff and the first defendant as partners of Soo Chew Trading'.

TAX UNDERCHARGED AND PENALTIES

[92] The appellant seeks an order that the first respondent and/or the second respondent do pay the Department of Inland Revenue the appellant's share of the under-declared tax and penalties as may be imposed on the grounds of tax improprieties committed by 'the partnership over the years. As a result of tax improprieties committed over the years, the Department of Inland Revenue had imposed a sum of approximately RM1,459,000 each on the appellant and the first respondent for under-declared tax in 1990.

[93] In dismissing the appellant's claim in respect of the under-declared tax and penalties imposed on the grounds of tax improprieties committed by the partnership, the trial judge held that tax is a personal liability and that there is no arrangement as between the appellant and the first respondent that tax is to be paid from the partnership funds or by the second respondent after the transfer of the partnership business. I find it somewhat difficult to understand the trial judge's dismissal of the appellant's claim when the following are not in dispute:

(a) that the under-declared tax and penalties were imposed by the Department of Inland Revenue on the grounds of tax improprieties committed by the partnership over the years;

(b) that the partnership had never declared any profits nor had the second respondent declared any dividends to enable the appellant to pay his share of under-declared tax and penalties imposed by the Department of Inland Revenue;

(c) the unchallenged evidence of the appellant that the partnership had been paying his income tax even after the transfer of the partnership business in 1989, as 'the accounts and monies were controlled by the first respondent and that besides … all matters relating to tax savings would be done by him'; and

(d) the cheque counter foils in the possession of the Department of Inland Revenue showing payment by the partnership of the income tax of both the appellant and the first respondent between 1975 to 1985.

[94] In the light of the established pattern of payment on behalf of the appellant and the first respondent, I see no reason why the appellant should not have in law a legitimate expectation that his personal taxes, including his share of the under-declared tax and penalties, would continue to be paid either from the partnership funds or by the second respondent. More importantly, it is to be noted that the partnership had never declared any profits nor the second respondent any dividends to enable either the appellant or the first respondent to effect such payment on their own. The judgment of Lord Denning in *Amalgamated Investment case* [1982] 1 QB 84 at p 122 cited by the Court of Appeal in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331, which is directly on point, is reproduced herein:

> When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[95] Whilst it goes without saying that the appellant's claim could only be allowed for good reasons, I am not averse to the glaring inequity of the situation confronting the appellant in that whilst the appellant is unable to settle his share of the under-declared tax and penalties imposed on the grounds of tax improprieties, the respondents had seemingly been able to do so.

[96] I shall allow the appellant's claim in order to rectify the glaring inequity as well. Incidentally, s 47(1) of the Partnership Act 1961 does provide that 'the rules of equity and of common law applicable in partnership shall continue in force, except so far as they are inconsistent with the express provisions of this Act.

ACCOUNTS AND INQUIRIES

[97] The appellant seeks accounts or inquiries in respect of the partnership as well as of the companies covering the following:

(i) funds and/or assets belonging to the partnership, including all assets and shares purchased and registered in the names of the appellant and the first respondent and in the names of the family members of the first respondent between 1963 and 1989 and thereafter;

A (ii) withdrawals and transfers of funds and assets in the names of the companies and of all payments and benefits received by the first respondent and his family members from the companies whether as directors, shareholders or otherwise.

B **[98]** The trial judge did not in his grounds of judgment address the appellant's claim for the various accounts or inquiries. I see no reason to deny the appellant's claim for the requisite accounts and inquiries in respect of the partnership affairs. There is no dispute that cheques had been drawn on the partnership bank accounts in favour of solicitor firms, stock broking firms, C the companies and the first respondent himself and his family members. Besides, the dealings and transactions of the partnership did not end upon the transfer of the partnership business to the second respondent in 1989 but had continued well after and into 1993, as apparent from the cheque counterfoils in the possession of the Department of Inland Revenue. D Similarly, I see no reason to deny the appellant's claim for the requisite accounts and inquiries in respect of the affairs of the companies. There is, likewise, no dispute that cheques had been drawn on the partnership bank accounts in favour of the companies and also cheques drawn on the second respondent's bank accounts in favour of the first respondent's family E members.

[99] The appellant's case for the requisite accounts and inquiries is all the more compelling by reason of the wholehearted trust that the appellant had F in the first respondent. The evidence of the appellant that he had trusted the first respondent wholeheartedly and had left everything about the finances to the first respondent had not been challenged. On the contrary, the trust is confirmed by the respondent's admission on pleadings and also by the fact that the bank accounts of the partnership had not been closed but continued G even after the transfer of the partnership business in 1989.

[100] In the circumstances, it is difficult to deny the appellant's claim, especially when the trust had been breached. I have already addressed the unilateral transfers of funds belonging to the partnership and to the second H respondent by the first respondent to himself and his family members. The breach had not abated as apparent from the respondents' admission in evidence through Saw Fatt Seong (DWl) that since 1995, the appellant had not been given information on the accounts of the partnership and of the companies and that documents had been destroyed without consultation in I the midst of the proceedings.

[101] In allowing the respondents' claim for the requisite accounts and inquiries, I am, of course, not dissuaded by the respondents' admission in evidence that documents had been destroyed in the midst of the proceedings.

The appellant's legal entitlement is not lost or in anyway diminished, and remains unaffected, even if he had previously never been denied access and had had all the opportunity to read and study the documents. *Lindley & Banks on Partnership*, (18th Ed 2002) on the production of books, etc at p 636 reads:

> If a partner has destroyed any books or accounts in his possession or otherwise improperly refuses to produce them, all necessary presumptions will be made against him when the account is taken. This may even involve estimating the profits of the firm.

Litigation Library, Disclosure by Paul Matthews and Hodge M Malek, 2001 at para 11.32, p 335 reads:

> Where a party has failed to provide proper disclosure or has destroyed documents, without there necessarily being any breach of an order or disclosure obligations, it is open to the Court to draw adverse inferences at trial in relation to the absence of documents.

Lindley & Banks on Partnership, (18th Ed 2002) on the partners' rights and obligations and citing Lord Lindley, at p 576:

> It is one of the clearest rights of every partner to have accurate accounts kept of all money transactions relating to the business of the partnership and to have free access to all its books and accounts.

Lindley & Banks on Partnership, (18th Ed 2002) on the right to production of documents and citing Lord Lindley at p 621 reads:

> The right of every partner to a discovery from his co-partner of all matters relating to the partnership dealings and transactions is as incontestable as his right to an account; and such right, like the right to an account, devolves upon and is enforceable against a partner's legal personal representatives and trustees in bankruptcy.

[102] I do not see how the appellant could be denied his legal entitlement, more so, when the entitlement is expressly recognised under ss 26(i) and 30 of the Partnership Act 1961. Whilst s 26(i) expressly provides that 'every partner may, when he thinks fit, have access to and inspect and copy' any of partnership books, s 30 expressly provides that 'partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives'.

DISSOLUTION

[103] The appellant seeks the following reliefs, namely:

(i) An order that the partnership be dissolved and that the properties of the partnership so declared be sold and that the proceeds of sale thereof be apportioned equally between the appellant and the first respondent.

(ii) An order that all monies belonging to the partnership, including such monies as are otherwise in the possession of the respondents and the family members of the first respondent, and so accounted and declared, be apportioned equally between the appellant and the first respondent.

[104] It is quite apparent that the orders sought by the appellant are intended to enable the affairs of the partnership to be wound-up and for the partnership properties and shares to be sold, and the proceeds of sale together with all monies belonging to the partnership to be apportioned equally between the appellant and the first respondent.

[105] The learned trial judge did not in his grounds of judgement address the appellant's claim for the necessary orders to enable the affairs of the partnership to be wound-up and distribution effected accordingly. Contrary to the respondents' submission, there are indeed no findings in the trial judge's grounds of judgment that the partnership had been formally dissolved in 1989, that all business dealings had ceased, and that the bank accounts had closed. Contrary to the respondents' submission as well, there is no averment on pleadings in the respondents' re-amended defence nor is there any evidence that the partnership had been dissolved as the appellant was intending to emigrate to the USA sometime in 1989. Indeed, I find the submission without merit as the respondents had in para 20 of their re-amended defence admitted the appellant's averment in para 23 of his re-amended statement of claim that 'the business of the said partnership had over the years expanded considerably and sometime in 1989 it was orally agreed between the plaintiff and the first respondent that the said partnership business should cease and that the goodwill and business of the said partnership be transferred to the second defendant'.

[106] I see no reason to deny the appellant's claim as there had been no formal dissolution of the partnership notwithstanding the transfer of the partnership business to the second respondent in 1989. The fact that the bank accounts of the partnership had continued to operate well into 1993 is not in dispute and would appear to confirm that the partnership had not ceased altogether. Even if there had been a technical dissolution of the partnership, whether upon the transfer of the partnership in 1989 or upon the death of the first respondent on 19 June 2001, it does not necessarily follow that the affairs of the partnership had thereby been determined or wound up. On the contrary, everything points to an unsettled and unsatisfactory state of affairs, with the properties purchased with partnership funds remaining registered in the names of the partners, the companies and

the family members, and monies and documents of title belonging to the partnership remaining in the possession of the respondents.

[107] The appellant's entitlement to a formal dissolution to enable the affairs of the partnership to be determined, including all transactions effected up to and after the dissolution of the partnership, is firmly established both under statute and common law. Section 31 of the Partnership Act 1961 provides as follows:

(1) Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection;

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

Section 40 of the Partnership Act 1961 provides as follows:

> After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue. Notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. …

Section 41 of the Partnership Act, provides as follows:

> On the dissolution of a partnership, every partner is entitled, as and against the other partners in the firm and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the court to wind-up the business and affairs of the firm.

Lindley & Banks on Partnership, (18th Ed 2002) on the principles as between partners on the winding-up of the affairs of the partnership at p 741 reads:

> B(1) Each partner is entitled to have the partnership property applied in liquidation of the partnership debts, and to have any surplus assets divided';

A B(2) Each partner is in general, entitled to force a sale of all partnership assets which are capable of being sold and to have the value of any unsaleable asset brought into account by the partner who retains it';

B(3) As a corollary of (2) save in special circumstances, no partner can insist on taking the share of any other partner at a valuation or to insist on a division of the B partnership assets in specie';

B(4) The right to wind up the partnership affairs is, however, personal to the partners, so that the representatives of a deceased, insolvent or mentally disordered partner will notnormally be permitted to interfere.

C

[108] Indeed, the judgement of the Federal Court in *Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* fully explains why there must be a process of dissolution to enable the affairs of the partnership to be wound up and the partnership property sold and the proceeds apportioned accordingly. D The Federal Court, in holding that 'there is a distinction between the right to property held jointly in the names of individuals and property held by individuals for partnership business' cited the judgment of James LJ in *Ashworth v Munn* as follows:

E … the share of each of the other partners no doubt is not a share in any specific asset or any specific part of the assets real or personal, but is his share of what will ultimately come to him when the accounts are ascertained, and when the partners who are to contribute have contributed, and when the assets are got in, the debts paid, and the amounts realised. …

F

[109] The Federal Court had also held that s 24 of the Partnership Act 1961 is a restatement of the principle enunciated in the case of *Ashworth v Munn*, ie, that a partner does not have any proprietary right or share in any partnership. As it is our finding that the statutory presumption that G properties and shares purchased with partnership money are partnership property had not been rebutted, I reproduce herein s 24 of the Partnership Act 1961:

Where land or any interest therein has become partnership property, it shall, unless H the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate.

ORDER OF INJUNCTION AND DAMAGES TO BE ASSESSED

I

[110] The learned judge had, in dismissing the appellant's claims, dissolved the order of injunction dated 21 December 1995 and ordered damages to be assessed. Briefly, the appellant's complaint is that the grounds of judgment makes no mention of damages to be assessed and that the order of injunction

dated 21 December 1995 granted after an inter-parte hearing is not subject to any undertaking as to damages. With respect, the fact that the learned judge had dismissed the appellant's claims altogether does not necessarily mean that the said order of injunction ought not to have been granted in the first place. The need to establish, after trial, whether the injunction ought or ought not to have been granted is rather important, since the appellant would no doubt have satisfied the trial judge at the inter-parte hearing on the criteria for an injunction pending trial following the principles of *American Cyanamid*. Unless there had been an express finding on the part of the trial judge that the said order of injunction had not been rightly granted, which I am unable to find in his grounds of judgment, I do not think that the trial judge should have ordered damages to be assessed.

[111] The issues raised by the appellant over the affairs and finances of the partnership and the companies are serious enough to warrant a trial of the matter. The severity of the letter dated 3 July 1995 from the second respondent to the appellant informing that payments of salary and all other expenses shall cease with effect from 1 July 1995 and citing no reason whatsoever clearly favours the case for an injunction pending trial. More importantly, I do not see how any valid challenge could have been made in the light of the undisputed position of the appellant as governing director and the safeguards against his removal from office or any proposed resolution which may affect his power under the articles of association of the companies. I am indeed satisfied that the law as to when damages becomes payable or when an undertaking becomes enforceable upon dissolution of an order of injunction is fairly established. *Commercial Litigation: Pre-Emptive Remedies*, (3rd Ed 1997) by Iain S Goldrein on enforcing the undertaking at p 128 reads:

> When does the undertaking become 'enforceable'? In *Ushers Brewery Ltd v PS King & Co Finance Ltd* [1972] Ch 148 at 154C, Plowman J identified the following sets of circumstances which are capable of rendering inquiry as to damages, namely: (a) the plaintiff has failed on the merits at the trial, or (b) it is established before trial that the injunction ought not to have been granted in the first instance, or (c) it is established, after trial, by an unsuccessful defendant, that the injunction ought not to have been given.

[112] My attention has also been drawn to the passage in the *Principles of Equitable Remedies* by ICF Spry, (4th Ed 1990) at p 478, which reads as follows:

> It has been said that unless an undertaking, or the lodging of security, is required of the plaintiff when an interlocutory injunction is granted, the defendant, even if he is in all respects successful when the matter is subsequently disposed of at the final hearing, is not entitled to compensation or redress for any injury or inconvenience that he may have suffered by complying with the terms of that

injunction. So it was observed by North J., 'If it should subsequently appear 'that such an order had been improvidently made, it is difficult to see how, in the absence of such an undertaking, the defendant could recover from the plaintiff the damages which are really sustained by him by reason of the improper order of the court.

[113] I am, however, inclined to adopt the stand that the absence of any undertaking as to damages is not necessarily conclusive that no damages may be ordered after a trial, if it is indeed established that the injunction ought not to have been granted. Although it is true that the said Order of Injunction is not subject to any undertaking as to damages, I hold that it is within the trial judge's discretion to order damages if justice so requires. Justice would require that the discretion be exercised, whether or not there exists an undertaking as to damages, if it is established that the injunction ought not to have been granted in the first place.

[114] In the circumstances, and in the absence of any express finding that the said order of injunction ought not to have been granted in the first place, the trial judge is therefore not justified to order any damages as a matter of course and in consequence of his dismissal of the appellant's claims altogether.

INJUNCTION (INTERIM PENDING WINDING-UP)

[115] The appellant seeks an interim injunction restraining the respondents from transferring and/or disposing of any of the assets or funds in the names of the companies and any of the assets and funds belonging to the partnership, pending the distribution to be effected as between the appellant and the first respondent equally. The learned judge did not in his grounds of judgment address the appellant's claim for what is essentially an interim injunction to restrain any dealings in the partnership property pending the winding-up of the partnership affairs. As it is my finding that the appellant is entitled and justified to have the affairs of the partnership wound up for purposes of sale of the partnership properties and for the eventual distribution of the proceeds of sale equally between the appellant and the first respondent, I would accordingly allow the appellant's claim to preserve the status quo.

[116] I do not think that there can be any serious challenge to the appellant's claim to have the status quo preserved. I have taken note of the appellant's complaint in evidence that there had been several breaches of the said order of injunction, including the disposal of partnership assets. However, what is indeed more compelling in favour of the status quo being preserved is the respondents' admission in evidence that the appellant had not been given any information on the accounts of the partnership and of the

companies, and that documents, including account books and bank statements, had been destroyed in the midst of the proceedings. That admission, in my view, more than anything, undermines any objection or challenge that, the respondents may have against the status quo being preserved.

[117] The appellant's entitlement to an interim injunction pending the winding-up of the affairs of the partnership is well settled and free from doubt. *Lindley & Banks on Partnership*, (18th Ed 2002), at p 641 states as follows:

> There has never been any doubt that the court will, in appropriate circumstances, grant injunctive relief where dissolution proceedings are pending or, in the case of a dissolved partnership, where it is sought, in Lord Lindley's words, 'to restrain one of the partners from doing any act which will impede the winding up of the concern'. Examples in the reports are numerous, and may be classified as follows:
>
> Assets: A partner will be restrained from disposing of or getting in the partnership assets if he is likely to misapply them. Moreover, the personal representatives of a deceased partner will be restrained from making any improper use of partnership property, if the legal estate happens to devolve on them.

INJUNCTION (PERMANENT)

[118] The appellant seeks an injunction restraining the respondents from determining the authority, power, rights, entitlements, interests, benefits and privileges of the appellant, including his monthly salary, whether as director, governing director or shareholder. The learned judge did not in his grounds of judgment address the appellant's claim for what is essentially a permanent injunction to restrain any interference or determination of the appellant's rights, entitlements and benefits, including his monthly salary. In as much as I have no hesitation in allowing the appellant's claim for an interim injunction pending the winding up of the partnership affairs, I would have no hesitation in allowing the appellant's claim for a permanent injunction to safeguard the appellant's rights, entitlements and benefits, including his monthly salary, whether as director or as governing director. There is indeed no doubt that the appellant's monthly salary, expenses, entitlements, rights and benefits are part and parcel of the appellant's rights and privileges in the companies. I am convinced that a permanent injunction would be quite appropriate to address the appellant's concerns. Indeed, the respondents could have no valid complaint in the face of the following considerations:

(i) the companies were indeed set up for purposes of tax savings and investments for the mutual benefit of the appellant and the first

respondent, and, hence, the extensive powers and privileges accorded to the appellant as governing director under the articles of association of the companies; and

(ii) the respondents' admission in evidence that the appellant had not been given any information on the accounts of the companies and that documents pertaining to the companies, including account books and bank statements, had been destroyed in the midst of proceedings.

[119] I have examined the articles of association of the companies on the position of the appellant as governing director and have no doubt that the respondents could not possibly have any valid complaint or objection when the articles of association of the companies do in fact provide for the following, in particular:

(i) that the appellant and the first respondent shall be the governing directors until they die or resign or vacate the office and that the provision for re-election does not apply;

(ii) that the other directors shall conform with and give effect to all directions given by them in relation to the company's business;

(iii) that in the event of any proposed resolution which may prejudicially affect the powers conferred on the governing directors, Soo Boon Siong @ Saw Boon Siong and/or Soo Boon Kooi @ Saw Boon Kooy shall in respect of the share or shares held by them on a poll, have a number of votes equal to the total number of votes conferred on a poll, on the holders of all other shares then issued.

INTERVENTION

[120] I am mindful of the limits of appellate intervention. It is trite law that an appellate court will not interfere with the findings of fact unless the trial judge is shown to be plainly wrong in arriving at a decision or where there has been no or insufficient judicial appreciation of the evidence. The principles of appellate intervention had been discussed by this court in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 2 MLJ 115.

[121] Counsel for the appellant had listed out a series of findings on the part of the trial judge which are either not supported on pleadings or in evidence. I have already addressed most of the findings, and have given my reasons when rejecting the findings. The following findings in particular, which I have not addressed specifically, but which nonetheless are erroneous and prejudicial, are further reasons why the appeal would have to be allowed:

(i) the finding that the appellant is not illiterate in English as he claimed to be and that the appellant had in evidence claimed that he could not

read and write in English, when the appellant had in evidence stated that he could read, write and converse a little in English; and

(ii) the finding that the appellant knew the existence of the current accounts as evidenced by the letters written to the Inland Revenue well before the problem between the appellant and the first respondent, when the letters referred to were in fact written well after the problem and the commencement of the proceedings.

CONCLUSION

[122] In the circumstances, and having reviewed the law and evidence and the trial judge's grounds of judgement, I will allow the appeal with costs here and below. The deposit is to be refunded to the appellant. For avoidance of doubt, and in line with my findings, I would order as follows:

(A) The whole of the order of the High Court dated 18 March 2005, save for para 2(a) therein, is hereby set aside;

(B) That para 2(a) of the Order of the High Court dated 18 March 2005, ie. 'that the trade marks as listed and shown in the Schedule 'A' attached hereto ('the said trade marks') are the property of the partnership of Soo Chew Trading', is hereby affirmed; and

(C) That the following of the appellant's claims be allowed:

Companies

(1) A declaration that on the true construction of the Articles of Association of the second, third, fourth and fifth defendants ('the companies'), the appellant is a governing director of the companies and that the resolutions whether passed at any directors' meetings and/or any ordinary or extra-ordinary general meetings to determine the authority, power, rights, entitlements, interests, benefits and privileges of the plaintiff whether as director, governing director or shareholder are null and void.

(2) A declaration that the shares in the companies allotted, issued or declared to-date otherwise than in the names of the appellant and the first respondent on an equal basis are in breach of the agreement between the appellant and the first respondent, ultra vires the Articles of Association, in breach of fiduciary power of the directors, and without consideration and are null and void.

(3) A declaration that the first respondent do indemnify the appellant for the difference between the share equity at 50% in the companies which the appellant would have been entitled and the share equity in the companies currently registered in the name of the appellant.

A Partnership property

(4) A declaration that all landed assets purchased and registered in the names of the companies between 1963 and 1989 and thereafter, including the assets as set out in the appellant's bundle of documents, (bundle B (pp 232–237), are the properties of the partnership of Soo Chew Trading and are held by the companies in trust for the joint benefit of the appellant and the first respondent in equal shares.

(5) A declaration that the shares in Heng Lean Development Sdn Bhd purchased and registered in the name of the fourth respondent are the properties of the partnership of Soo Chew Trading and are held by the fourth respondent in trust for the joint benefit of the appellant and the first respondent in equal shares.

(6) A declaration that the monies belonging to the partnership of Soo Chew Trading transferred to the companies are held in trust by the companies for the joint benefit of the appellant and the first respondent in equal shares.

(7) A declaration that the monies belonging to the partnership of Soo Chew Trading and transferred by the first respondent to himself, between 1963 and 1989 and thereafter, including the monies held by the first respondent in his bank accounts with HSBC, Butterworth and Alliance Bank, Butterworth (formerly known as Malayan French Bank) are held in trust by the first respondent for the joint benefit of the appellant and the first respondent in equal shares.

(8) A declaration that all public quoted shares purchased and registered in the name of the first respondent between 1963 and 1989 and thereafter, including the shares in HSBC Holdings plc and the shares quoted on the KLSE and on foreign bourses as set out in the respondents' bundle of documents, bundle AB (pp 506–516), are the properties of the partnership of Soo Chew Trading and are held in trust by the first respondent for the joint benefit of the appellant and the first respondent in equal shares.

(9) A declaration that all landed assets purchased and registered in the names of the appellant and the first respondent, whether singly or jointly, between 1963 and 1989 and thereafter, including the assets set out in the appellant's bundle of documents, bundle B (pp 228–230) and in the respondents' bundle of documents, bundle AB (p 506) are the properties of the partnership of Soo Chew Trading and are held in trust by the appellant and/or by the first respondent, as the case may be, for the joint benefit of the appellant and the first respondent in equal shares.

A and that the first respondent do indemnify and pay to the appellant the value of one half (1/2) of the said properties upon completion of the valuation so ordered herein.

(16)A declaration that the apartment in Los Angeles, USA, purchased and registered in the names of the family members of the appellant in 1989 is the property jointly owned by the appellant and the first respondent in equal shares (less the contribution made by the appellant's wife equivalent to 15.79% of the purchase price) and that the appellant do indemnify and pay to the first respondent the value of one half (1/2) of the said property (less 15.79% of the value) upon the completion of the valuation so ordered herein.

Accounts and inquiries (companies)

(17)An account or inquiry into all withdrawals and transfers of funds and/or assets in the names of the second, third, fourth and fifth respondents whether or not in the course of business or otherwise.

(18)An account or inquiry into all payments made or benefits received by the first respondent and his family members from the companies, whether as directors, shareholders or otherwise.

Accounts and inquiries (partnership):

(19)An account or inquiry into the funds and/or assets belonging to the partnership of Soo Chew Trading.

(20)An account or inquiry into all landed assets and public quoted shares purchased and registered in the names of the appellant and the first respondent, whether singly or jointly, between 1963 and 1989 and thereafter.

(21)An account or inquiry into all landed assets and public quoted shares purchased and registered in the names of the family members of the first respondent whether singly, jointly or otherwise between 1963 and 1989 and thereafter.

Trade marks

(22)A declaration that the trade marks registered in the sole name of the appellant, in the joint names of the appellant and the first respondent and in the name of Soo Chew Trading, whether with the Trade Marks Registry, Malaysia and/or elsewhere outside Malaysia, do belong exclusively to the appellant and the first respondent as partners of Soo Chew Trading.

A and that the first respondent do indemnify and pay to the appellant the value of one half (1/2) of the said properties upon completion of the valuation so ordered herein.

(16)A declaration that the apartment in Los Angeles, USA, purchased and registered in the names of the family members of the appellant in 1989 is the property jointly owned by the appellant and the first respondent in equal shares (less the contribution made by the appellant's wife equivalent to 15.79% of the purchase price) and that the appellant do indemnify and pay to the first respondent the value of one half (1/2) of the said property (less 15.79% of the value) upon the completion of the valuation so ordered herein.

Accounts and inquiries (companies)

(17)An account or inquiry into all withdrawals and transfers of funds and/or assets in the names of the second, third, fourth and fifth respondents whether or not in the course of business or otherwise.

(18)An account or inquiry into all payments made or benefits received by the first respondent and his family members from the companies, whether as directors, shareholders or otherwise.

Accounts and inquiries (partnership):

(19)An account or inquiry into the funds and/or assets belonging to the partnership of Soo Chew Trading.

(20)An account or inquiry into all landed assets and public quoted shares purchased and registered in the names of the appellant and the first respondent, whether singly or jointly, between 1963 and 1989 and thereafter.

(21)An account or inquiry into all landed assets and public quoted shares purchased and registered in the names of the family members of the first respondent whether singly, jointly or otherwise between 1963 and 1989 and thereafter.

Trade marks

(22)A declaration that the trade marks registered in the sole name of the appellant, in the joint names of the appellant and the first respondent and in the name of Soo Chew Trading, whether with the Trade Marks Registry, Malaysia and/or elsewhere outside Malaysia, do belong exclusively to the appellant and the first respondent as partners of Soo Chew Trading.

Tax and penalties

(23)An order that the first respondent and/or the second respondent do pay to the Department of Inland Revenue the appellant's share of the under-declared tax and penalties as imposed by the Department of Inland Revenue on the grounds of tax improprieties.

Dissolution (winding-up)

(24)An Order that the partnership of Soo Chew Trading be dissolved and that the properties of the said partnership so declared herein be sold and that the proceeds of sale thereof be apportioned equally between the appellant and the first respondent.

(25)An order that all monies belonging to the partnership of Soo Chew Trading, including such monies as are otherwise in the possession of the respondents and the family members of the first respondent, and so accounted and declared herein, be apportioned equally between the appellant and the first respondent and be paid accordingly to the appellant by the first respondent.

Injunction (interim pending winding-up)

(26)An injunction restraining the respondents, whether by themselves, their servants or agents or otherwise howsoever, from transferring and/or disposing of any of the assets or funds in the names of the respondents and any of the assets and funds belonging to the partnership of Soo Chew Trading including, such assets and funds so accounted and declared herein, pending such apportionment, distribution, transfers and payments to be effected as between the appellant and the first respondent.

Injunction (permanent)

(27)An injunction restraining the respondents, whether by themselves, their servants or agents or otherwise howsoever, from determining the authority, power, rights, entitlements, interests, benefits and privileges of the appellant, including his monthly salary, whether as director, governing director or shareholder.

Costs

(28)Costs of the proceedings here and below to be paid by the first respondent to the appellant.

[123] My learned brothers, Low Hop Bing and Suriyadi JJCA have read this judgment in draft and have expressed their agreement with it.
Appeal allowed.

Reported by Brendan Navin Siva